

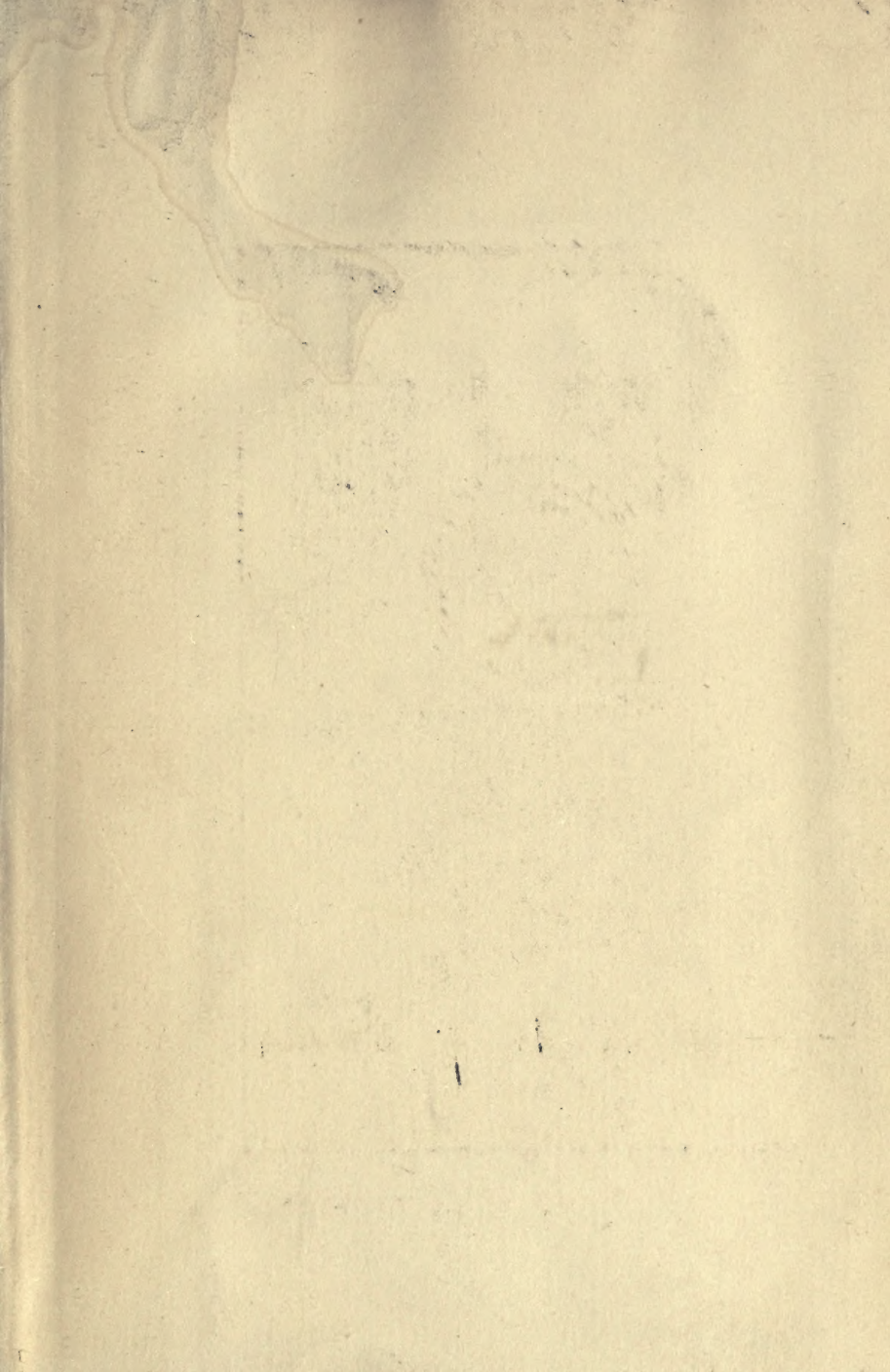



3 1761 03552 9783



Presented to
The Library
of the
University of Toronto
by

Mrs. D. J. Snider





Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

Pol. Sci
S6724s

THE STATE

SPECIALLY THE AMERICAN STATE

Psychologically Treated.

BY

DENTON J. SNIDER, Litt. D.

153369
26 / 11 / 19

ST. LOUIS, MO.,
SIGMA PUBLISHING CO.,
210 PINE ST.

(For Sale by A. C. McClurg & Co., Booksellers, Chicago, Ills.)



COPYRIGHT, BY
D. J. SNIDER, 1902.

TABLE OF CONTENTS. .

	PAGE.
<i>PART FIRST.</i>	
PRELIMINARY TOPICS	5-57
<i>PART SECOND.</i>	
THE CONSTITUTION	58
1. THE PREAMBLE	69
2. THE THREE POWERS	87
(1) LEGISLATIVE	94
(2) EXECUTIVE	192
(3) JUDICIAL	236
3. THE REPRODUCTIVE PROCESS OF THE CONSTITUTION	290
AMENDMENTS	356

PART THIRD.

POLITICAL SCIENCE	382
1. THE POSITIVE STATE	393
2. THE NEGATIVE STATE	450
3. THE EVOLUTION OF THE STATE	478
APPENDIX	497

Part First.

PRELIMINARY TOPICS.

In writing a work on *Social Institutions*, the treatment of the State grew to such a size that the author felt compelled to put it into a separate book, which book the reader now has before him. To an American the great Institution is his State, which he has ultimately to govern, and which he ought to study and understand. The present object is to put the State, particularly its newest form, which is the American or Occidental State, into line with the newest science, which is Psychology.

It should be noted, however, that this science is not the old Rational Psychology nor the recent Physiological Psychology, but a new discipline, the Occidental one, which is just getting to be.

The great creative discipline of the Orient was Religion; that of Europe has been Philosophy; that of the Occident seems destined to be Psychology, which is the science of the Self, both human and divine, and which thus places the supreme scientific worth upon the Person.

The State, then, treated psychologically, is our theme. The first fact of the State is that it has power; it must be able to execute its commands, otherwise it is no State; thus it shows itself an active energy in the world. It has Will; we may deem it a Will, distinct, working in its sphere, according to its own law, which we shall find to be just the Law.

With this conception of the State as Will we reach down to its fundamental psychical trait, and thus bring it back to the human Self, which has also Will, and correlates it with the same. Undoubtedly the State must have intellect, too, and be guided by knowledge; likewise it must be administered by men who have the feeling of the State, patriotism. These, however, but subserve the State, which is the grand doer, Will.

This principle of Will, however, is not peculiar to the State which has it in common with all other Institutions. It behooves us, therefore, first of all to bring home to ourselves some idea of an Institution.

I.

We picture a man sitting at home with wife and children about him; he is conscious of a unit including all these people in its membership, of a kind of line drawn around them and embracing them in a circle, which in common parlance is called the domestic circle. There is a tie connecting them, a tie which is given by Nature herself, and which is supposed to work in the very blood of these members, so that it circulates not merely in each single body of flesh, but likewise in the total body domestic, which wields just the power which controls and commands each person as member of this so-called Body Domestic. Herein we begin to see the Institution of the Family, whose behests the parents as well as the children are to obey. The father toils day in day out in order that the demands of the Family may be met; the mother is certainly not behind-hand in her care and labor unto the same end. Thus the Institution which they have entered taxes them, levying upon them a tax which may be said to be the very flower of existence. Veritably there is a Will over them, dictating to them their supreme task ordinarily, which, however, is, or ought to be, their own inner dictation, also. A Will it is, yet not that of any individual alone; an invisible power over the individual Will it possesses, yet completing, confirming, and securing this individual Will.

So we must conceive it as an institutional Will, or the Will as an Institution, here the Family.

Such, then, is the Family with its tax first and greatest. But into this domestic circle is next brought a small piece of paper which makes a new demand. It comes from the baker, who has given of his labor; the bread which the individuals of the Family have consumed, must be paid for. But who is the baker and what does he represent? A little reflection will lead us to the fact that he must have flour for making his bread, whereby the miller is introduced; but the miller needs wheat, which is raised by the farmer, and they both need machinery of various kinds, as well as clothing and shelter. Thus we find that the baker, in order to send his loaf of bread to the Family, has to make himself a link in a vast circling chain of employments, a new circle, which is ceaselessly moving in its round of production. Here, then, is a different system or circle outside of the Family, yet pushing into it with bill in hand, and requiring payment. This we call Society, or the Social Whole, most generally known as the Business World.

Thus rises a new Institution, external to, yet interlocking with, the Family, commanding the latter or some member of it to give an equivalent of effort for the product which has been furnished to it. And the Family or its member must obey. For this Institution is also a Will,

imperial within its sphere, and enforcing its claims with a mighty energy, as it has a first mortgage upon the primordial wants of the human being, namely food, raiment and shelter. So the member of the Family has to go forth to work, and through this give some product of his individual Will, that he may receive in turn the products of this vast Social Will or Institution, which are necessary to satisfy the wants of life. Such an intricate complex of multitudinous human activities has that little baker's bill opened to our vision, if we but follow it out to its sources. Another Institution, determining the individual on the one side, yet being determined by him on the other, we can discern at least in outline.

But perchance while gazing at it we are interrupted, or rather the head member of our Family is interrupted, by having another piece of paper presented to him with an ominous writing upon it. Alas! another bill with its tax, this time a genuine tax-bill, the pure thing unveiled to the beholder, who inevitably gazes at it with a scowl and often with a growl. That baker's bill he understands; he and his have actually eaten the bread, and with it have satisfied their hunger. But whence comes this fatal leaflet bidding me pay for that which I have not eaten or drunk or worn, bidding me pay over for this house which my own hands have built?

Still the bill has to be paid, for the command is even more authoritative than that of the baker's bill. For if this tax is not settled in due time, the house itself which is taxed is sold by supreme authority, and the builder is turned into the street homeless. Truly here is a Will with a vengeance, in fact just that Will whose function is to avenge and to punish. Our little piece of paper has again led us to an Institution universally known as the State, which is the topic of the present book.

Indeed this State can levy another tax far more terrible. With resistless power it can enter the Family and take the head member of it, the bread-winner in person, saying "Come with me, I have need of thee." Not simply some work of the man, some portion of his effort in the form of property is appropriated, but the whole of him—the awful tax which the State imposes for its own defense, bidding the man go upon the battle-field and hazard his life that it, the State, may live. Yet the man will pay this tax too, yea will volunteer to pay it, since it is, when he thinks about it, the deepest requirement of his own heart as well as the coercive mandate of his own reason.

Such, then, are the three kinds of taxes which the three Institutions — Family, Society, State — impose upon the individual, who is a member of each. Thus he becomes conscious, doubtless at

times painfully conscious, of an institutional world above him, from whose commands he cannot escape except by renouncing civilization and fleeing to the woods. It may be here added that the three Institutions just mentioned, though separate, form together a single sphere or process, which unites them in a common name and thought, this sphere being the Secular Institution. Still further, this Secular Institution is but the first in a vast cycle of Institutions which includes two others, the Religious and the Educative Institutions. (For a fuller treatment of these Institutions in their meaning and interconnection, see our work on *Social Institutions*.)

The State, then, is the third of the Secular Institutions, which fact indicates its psychical character as a return to other Institutions for securing them and itself, as well as the individual Will, through the Law. Whereof a good deal is to be said in the forthcoming exposition.

II.

Let us first conceive the State as one whole Will which all the Wills of the People constitute. It is distinct, a separate entity, as if all these constituent individuals made one colossal Individual, who is all of them put together, yet is himself too. He is not only the *Will of All*, but is the *All-Will* — nothing but Will whose

content, aim, purpose is to will Will, that is, to secure man's free activity through the Institution.

This colossal Individual has a voice and utters himself; this utterance is a command, being that of a Will; such command is called the Law. The voice of the State as the All-Will is the Law, which is, therefore, universal, of all and for all. The State's word and its only word fully articulated is Law.

As the human organism brings to its center each sensation on its surface, making the same whole and complete through its own total process, which returns to the originating stimulus, securing it and reproducing it, so the State as All-Will must bring to and through its center each individual Will, securing it and re-affirming it through the Law, which indeed is a kind of re-creation of it. Thus we may see that the State in one sense is prior to the Individual (as ancient Aristotle said) since the latter is not complete without the former. But it is equally true that the Individual is prior to the State; that is, they both form one process, each part of which is both before and after the other.

Thus the question about the priority of the State or Individual is very similar to that other question: Is the hen first or the egg? The fowl produces the egg, but the egg produces the fowl, which is thereby creative, or self-producing, and the whole is the process of generic preservation.

Every individual person is to will the State, which is to return and secure his Will. Thus each and all are one in the State, without conflict, the one All-Will secures the Will of one and all. This reflex action of the Will in the Institution is what unites and associates men, causing them to intergrow in a communal life of some kind, for Will cannot destroy or even neglect that which secures Will without self-destruction. Or we may say that the Will of each has to totalize itself, and return to itself through such totality of Will, which brings back to it its own free activity affirmed through all Wills. Such is the reflex principle inherent in every Institution and specially in the State.

We may concentrate the foregoing observations into a kind of formula: The State is Will actualized, existent, objective, whose end is to secure Will (or freedom) through the Law. It is the Institution which speaks, and that which it speaks is a command — the Law — bidding every individual under its sovereignty to be a free man, that is, to will Free-Will through the Institution. At least such is its ultimate purpose.

III.

The Constitution of the United States, along with its growth up to the present, may be deemed the latest manifestation of the State in the his-

toric line of governments from the beginning. It with its short career of development is, therefore, the best explanation of what the State is, of the meaning and end of the State. It throws its light back to the very starting-point of the State, by showing what the latter has become in the evolution of the ages. The small genetic cell of the State, as we may call it for illustration, utterly undeveloped in its primitive shape, we can see growing and unfolding into this its latest form, and thereby tell what lay ideally in the embryo.

Herein it is not intended to affirm that the State has attained its perfection or reached its concluding act. On the contrary, in its new illumination of the past we may faintly see some outline of its future shape. We are made more certain of the coming evolution when we trace the changes up to the present, in which they assuredly do not stop.

The philosopher has often told us that the world is moving towards its cause and not from it; that man is returning to his source in a deeper sense than he ever proceeded from it. In the same way the State is forever evolving its higher self and showing what lurked in its first germ and all its succeeding forms. What the patriarchal State signified, what lay in the Oriental Monarchy, and also in the European Nation, can best be seen in its last explication in the United

States. For this reason the American State is the key put into the hand of the present for unlocking the political science of the past.

To be sure, we may well expect that the State as realized a thousand years hence will give a still deeper explanation, a more adequate revelation of the political embryo of the race, and of its early forms. The American Constitution is to fling its search-light back upon the primal Village Community and upon the Asiatic despotism, and show what lay unborn in the egg which they were hatching.

It is not a narrow patriotism which declares that the most important subject of political study is the United States. Specially is this study important for the citizens who, as exercising self-government, should be self-conscious, knowing themselves and government in order to govern themselves.

So we have to study the embryology of political science as well as of every other science in the present age of evolution. We explore the earliest and rudest shapes of associated man in Institutions and Laws, for they, too, have their light for our time. But this is not all. We must pass from the outer historical to the inner psychical evolution, and trace its institutional movement. Thus we get back to the fountain-head, which is just man's creative Self, his Ego, which at first quite instinctively and then consciously

builds these social habitations for itself. So the ultimate study of Institutions, including the State, leads us back to man's fundamental psychological activity, to the very process of his Selfhood (otherwise named the Psychosis), out of which arises his institutional world, whose order and system must therefore be founded upon this movement of the primal genetic Self. Hence Psychology is here the organizing, because the creative science, as it is elsewhere.

IV.

And now what may we select as the salient characteristic of the United States? Can we catch the key-note of its harmonies, utter it in a sentence or even in a word, which shall run through and unify our theme, our thought, and by the way, our book? This fundamental note is found in the term *State-producing*; the United States is not only a State, but the producer of States, not instinctively so but consciously, with design. The origin of the State is not now left to chance, to migratory caprice and accident, but is ordered, is made rational, of course unto the one great end of freedom.

Here we may insert a remark on nomenclature. There are two very different kinds of States conjoined and inseparable; yet they must be distinguished. One is the United-States, the

creator of States, which we shall often (though not always) hyphenate and employ in the singular. The other is the Single-State, the created yet also creating, not in itself but through the totality of which it is a member.

One will, then, find the Constitution of the United-States to be the truly creative soul of the American Union, having as its deepest trait the genesis of States; hence it is the State of States, or the Universal State for the first time, the State-producing State.

The individual citizen is to will not only the Law but the Law-creating State; then he must will not only the Law-creating State, but also that which creates the State — the State-creating State. That is, every citizen voter must go back of his special State, and vivify by his Will that which created his State. He must be perpetually willing into existence not merely the State but the State of States. The genetic process of State-making must never lapse from his consciousness if he wishes to be truly a free man.

For the constitutional State by itself has in it still something arbitrary, or may have — something unfree which does not fully will Free-Will. It is still an individual State and does not will actualized Will as such, that is, in another State; it may even suppress the same, as the European State does in its provinces, as even England, the best of them all, has done in Ireland and elsewhere.

There must be, then, a State or actualized Will whose function is to secure, to call forth, to create this actualized Will, else it may be assailed from the outside and destroyed. The individual State alone finds it difficult to preserve itself by itself.

And the individual State has been always inclined to subject the neighbor State, that is, to assail actualized Will in another People — really to contradict its own fundamental principle.

Look at Europe with its armaments — what do they mean? The mightiest effort of the individual State is to keep its independence. Such is the slow self-destroying outcome of the European Nation-State so-called. As it has subjected other provinces and peoples, so it is in everlasting danger of having its own deed applied to itself, of being subjected in its turn. Why not? So there shall rise the New State on a different basis.

This New State must have just the opposite characteristic; it must will the State as autonomous, yea it must create the State and then secure it as an actualized Will. This State is not simply an actualized Will securing Free-Will to man through the Law, but an actualized Will which in its legislation creates and secures that actualized Will which secures Free-Will. This is the new colossal step forward in the evolution of

the State. It is the great advance upon the Nation-State of Europe in its highest forms.

In general the individual State of the past bifurcates in America and becomes twofold — the United-States, and the Single-State. The latter usually is designated as simply the States, in contrast with the Union; but we shall often permit ourselves to use a more pointed term, especially when it is necessary to emphasize its distinction from the United-States and from the individual State of other times and places. The American Single-State has, then, its unique place and meaning; this fact we shall try to indicate by our way of writing it, hinting its relation to the General State, or what we have called the State of States.

Internally, the State of States is to secure “a republican form of Government” in every Single-State. So the Single-State cannot now oppress its citizens or turn despotic without correction. Nor does the State of States need to have much of an army, when each Single-State wills its neighbor to have what it has.

The influence of the central State — the modern Republic, as distinct from the ancient Roman one — upon the Single-State is primarily to secure its freedom *from the outside*, yet the former requires an inside order corresponding to itself, namely, a self-governed Whole through Constitution and Law.

Thus, in the United States, the Single-State itself is put under Law. Never before was such a State heard of. The Oriental as well as the European State was sovereign, could do as it pleased, and often was capricious, like an individual. But now the Single-State has to be rational, and will the universal Will as expressed in the Constitution of the United States. Or we may now say that the individual State, internally and externally (territorially) limited, has become a member of the universal State not thus limited. So we have no longer the independent single State, but the Society of States, which Society is just the new State, truly the genus forever reproducing the individual State.

And this reproduction is not left to haphazard migration or mere tribal instinct, but has become conscious, is put under Law. The great migrations of the Eastern Continent were a predatory overflow into other lands; but the making of the State is now not simply a popular impulse, but a constitutional act.

The Legislative Power makes the Law, yet what makes that Power to make the Law? This is the Constitution of the State, unwritten or written. But what makes the Constitution? This is the outgrowth or the expression of the Will of the People.

Thus the Constitution of the State springs immediately from the popular consciousness.

But now comes a new State with its new Constitution, which is not only Law-making, but State-making, the Constitution of all Constitutions, since it is not merely the organic Law of an individual State, but that of the general State producing individual States.

So we have come to the Occidental State, or State of States, that is, the State-producing State; it is the Empire which does not destroy or subordinate States, but creates them; it is the universal Free-State whose whole supreme function is to beget and to secure the particular Free-State, leaving it free to its own inner development, and protecting it from without, yet through the Society of States.

It is no longer the Nation-State, such as is the European Monarchy, which has still subjects, although with rights, and whose component States are provinces, are determined by, and do not determine the supreme authority. Still, Europe is reaching out for Federalism which has in it the recognition of the State simply, without the creation thereof.

Thus we seek to bring out and hold up before ourselves the fundamental characteristics of the United-States government, as it has been developed, particularly since the adoption of the Constitution. It is the latest form of actualized Will, and requires a corresponding personal or individual Will in the People. European ob-

servers have often declared in one way or other, that the leading psychical trait of the American People is Will. Hence the latter are the political folk of the present, for with their native energy there must be a corresponding actualizing of the Will in Institutions, which are to return and foster and secure the native energy of the individual. On all hands it is agreed that the result has been unparalleled; but only too often has the institutional element been left out of the account of this wonderful blooming of the human Will, everything being ascribed to its individual element. But it is the Institution which gives to the individual his deepest training.

V.

We may now go back and give some further consideration to the fundamental thought of the Institution, which was declared to be *Will actualized*. This formula, we must remember, applies to all Institutions, not merely to the State, which is only one kind of an Institution, being Will actualized *through the Law*.

Accordingly, in advance, we wish to study a little the principle common to all Institutions in the manner just formulated.

(1) The Institution is primarily called Will, because it is the most direct counterpart of the Ego as Will — the counterpart existent in the

world, no longer subjectively, but objectively commanding, willing, and doing. Hence it is often called another Person or Self, yet not with strict accuracy, for it is not a total Self or Ego.

(2) Why must I actualize myself? Or why must the Person make the Institution? In order to be complete, in order to be truly Person. The Will as merely subjective is incomplete, nay, is a contradiction; it is supremely the objectifier, and cannot fulfill its own process till it make itself object. And it shows three main stages of self-objectification. First is when it transforms the material world and makes things, as this chair, desk or house. Second is when it transforms individual conduct and moralizes the human deed, which gives the sphere of Ethics. But finally and fundamentally the Will must not only make an object, but must make itself object, which object is, therefore, Will. Thus the product of the Will is also a Will producing or willing anew its own object. Or let us conceive the Will as objectifier, then to complete itself, it must reproduce itself as this objectifying power, it must objectify itself objectifying. Now it has *completely* made itself object, and this is the Institution, which is accordingly Will.

Turning the thought in a different way, we find that each Will makes itself over into an object or product, which act in its entire process must show the Will returning into itself. So it

comes that finally the Will makes a product which is Will, namely, itself, thus coming back to itself as maker. If I make a chair, it is my particular product without activity of its own, but if the chair were a Will which could also function, it would be an actualized Will, an Institution, whose purpose and content is to return to the Will and affirm and secure it. In making the Institution it is manifest that the Will, though producing and objectifying, comes back to itself, producing and objectifying itself.

Here we note the reflexive process of the Will, always self-returning in order to complete itself, and thus revealing its innermost psychical movement or Psychosis. *The Will* must not only produce something, but also must reproduce itself as object, which reproduction is simply its own process of self-completion.

In like manner we have just seen that the State as Will must return and reproduce itself in order to complete its own self-evolution. Hence there has arisen the State-producing State, really the third or Occidental stage in the entire historic development of the State. Also we see the self-returning process (the Psychosis) suggested in the very designation of the State.

Here, then, we should note that the Institution is the third or self-returning stage of the total field of Will; also that the State is third of the Secular Institutions for the same general reason;

also that the American or Occidental State is the third in the total development of the historic State, having been preceded by the European and Oriental States.

(3) This principle of actualization is common to all Wills, the one thing they have to do, the one product they have to make. Each Will has to actualize itself to be itself; this is what they produce in common — their community. In all other activities, each Will is different, but in its communal or institutional activity it is one with the rest. This person produces this object, another that; but each man, producing what is different from himself, and even what is different in itself, rises out of this multiplicity of production into unity in and through the Institution, which, however, has its own process and hence its own divisions and organization.

Men having Will in common, cannot help having a Common Will, which is not simply their subjective agreement but their objective Institution, active in itself, a Will. Hence we find men from the first existing in societies, and reproducing social forms on a parallel line with their individual activities. The total process of Will must always be present, and this involves its third or self-returning stage, which is Will actualized or the Institution.

Here rises again the question, Which is first, the Institution or the Individual? Aristotle, as

already cited, made the State the prior principle. Plato in a similar spirit has the State come into existence because the Individual by himself is not self-sufficient (*autarkes*, enough unto himself). In order that he be self-sufficing, the process of his Will must be complete, must actualize itself objectively in an Institution.

(4) Moreover the Institution as such has its own peculiar content or end: it is to secure Will. The Individual is not self-sufficing till his Will not merely completes itself in the objective Institution, but also returns to itself and secures itself through the Institution. This is the institutional Will, or the Will as Institution, which, as before said, is the third stage of the total movement of Will (see *The Will and its World*, pp. 29, 31). Thus the common Will or Community secures each Will in its free activity; or the All-Will vindicates the Will of each and all; or the universal Will as Institution universalizes the individual Will, so that every one can have his own Will without conflict. In this way the immediate, natural, individual Will, being partial and imperfect, is made integral.

Manifestly the Institution calls forth Will in its totality, which does not truly exist outside of Institutions. Herein we may see the pedagogic value of the latter. For the Institution forms the Individual quite as much as the Individual forms the Institution. The State,

for instance, is the greatest educator of its people, and keeps up its training to the end. The Institution, in general, is what wills Will, reproducing it, forming it over, moulding the activity of the man at its source. And the ideal end of the Institution is to actualize Free-Will in the world and in every human soul. Thus the Institution is deeply genetic of Free-Will, the supreme trainer thereto throughout life. And by Free-Will we always mean freedom through the Institution, not the immediate natural, capricious freedom of the Individual.

There is no account of the Individual existing without some kind of social Institution. Such an Individual would be a Polyphemus, as Homer has portrayed him in the *Odyssey*, who dwelt wholly apart from Family, Society, State, and even prayed not to the Gods. Hence such a being is figured as a monstrosity, extra-human — an anarchist, atheist, and cannibal. To be sure a few people have fled to solitude, becoming saints or devils. But the rule is, men are associated in some way, in clan, sept, tribe, horde, nation, etc. The human being is born into such a social Body so that it seems first, yet he has to re-make it perpetually, so that the individual also seems first; but really both belong together in the one process, and either cannot be without the other.

(5) Actualized Will is not a mere agreement

of Wills. It is not the Will of all, which may be a mob bent on lynching a malefactor. This is really the destruction of the Institution. The culprit may deserve to be hung, and all may wish to hang him, but if they do they violate the State with its law. For even the Will of all is not to execute itself immediately, but only through the Institution. So a Lynch-proceeding, though the punishment may be just, is anti-institutional, abolishing the very means of justice and order. Thus the Will of all can destroy the All-Will, which is to mediate the former. The popular Will as such cannot take the place of the Institution, even if it seeks to avenge a foul crime.

(6) It will be often asked: How can there be a Will which is no person's Will? And which also wills something or has a content? Undoubtedly Will is primarily connected with the Self, being a stage in the process of the Ego. But this is subjective Will, while the Institution is Will as objective, actualized, working not subjectively but objectively. Thus the two are very different, and require different names and different conceptions, even if one is derived from the other. The individual, singly or collectively, is not the All-Will, or the objective Institution.

It is true that many authors of high repute have called the State a Person, notably Hobbes, Rousseau, and even Hegel. Yet all these named

writers have sought to show forth the State as distinct from and commanding the individual. But the result is confusion. The very point of the Will as State is that it must be made active by the individual Will administering it; it is not an *Ego*, yet it must be *Egoized*, which, however, is but one stage of its total process, namely that of administration. Rousseau has tried to help himself out by the term "Moral Person," but this would make the Institution even more subjective than the simple word *Person*.

Another question is sometimes raised: If the State is Will separate from the Person, why call it Will, why not name it Power, Energy, Force? That too would lead to sore misunderstanding, as it would hint the State determined by something outside of itself. No Power or Force can have itself as end or content except the Will. Hence we say that the State is a Will actualized, whose content is to secure Will, specially through the Law, which last fact gives the characteristic of the State as distinct from other Institutions.

VI.

In opposition to the theory of Contract for explaining the origin of Institutions, Sir Henry Maine has uttered his most famous doctrine: "the movement of progressive societies has hitherto been a movement from *Status* to *Contract*," and not the other way (Maine, *Ancient*

Law, p. 165). That is, personal obligations are at first put upon the individual by his Community, but are finally determined through his consent, by Contract. According to Sir Henry, Status means in general external determination of the man through the Family, Contract means, as far as it goes, the internal determination of the man through his own consent.

There can be little doubt about the truth of the mentioned principle, though it extends beyond the Family to Tribe, Community, City. Early Institutions of all kinds determine the Status of their members immediately. But as man increases in Free-Will, which is his goal, the Institution corresponds, and gives to him the right of consent, of Contract.

It must be affirmed, however, that "the movement from Status to Contract" does not complete the movement. The Institution is not only to secure the free individual in Contract, but the free individual is in turn to secure the free Institution. The movement, then, is from Status, through Contract, to the State which actualizes the Free-Will of the Individual in its complete circuit and not merely in Contract.

Language seems to suggest this movement. In Greek, *polites* (the citizen) is derived etymologically and institutionally from *polis* (the city),

which is first, as in English ; but the third in this cycle of words is *politeia* (republic), which is derived from the second, that is, from the citizen, yet returns to the first, and signifies what may be called the City-State. The same movement, though not so distinct, may be traced in the Latin words, *urbs, civis, civitas*. The transition of *Status* into *State* is likewise not simply etymological, but also institutional; the word *State*, though of Latin origin, hardly belongs to antiquity, or even to feudalism, in its modern sense, which dawns distinctly with the Nation-State.

Now this State-forming process of the Free-Will of men has also been called a Contract between them, the "Social Contract," underlying all Institutions.

Rousseau's State with its Contract requires the self-conscious citizen knowing what is a Contract, and what he is contracting about. He must understand that he is forming a collective Body or Will, which is to subordinate his own Will, yet give it back, and secure it.

Moreover, this collective Body or Ego (*moi commun*) must have a voice, or must show what it is, namely, a written Contract with many particulars, the terms of which the individual is to know.

Citizens, like the old Athenians, voted upon their laws, but not upon the State as such, which was making the Laws. The State was the given thing; little or no difference appeared between

statutory and constitutional Law, and still this difference was fermenting already in old Greece.

Men do not come together and say: "Let us now go to and make a State." As if they had lived hitherto, could have lived hitherto without a State of some sort! The very condition of their coming together in peace would be the State. Indeed, as having Wills, these could not act and exist without actualizing themselves in the State, and already having a State in which they are actualized.

Still the idea of a primitive Contract has entered very deeply into modern political speculation. But Contract is not first in the development of the State, rather it is the later, as already observed. We are to see the State growing into the Contract, rather than growing out of it. Contract properly means a self-conscious agreement between individuals about some matter, here about the government under which they are to live. All this demands an advanced stage of development, in fact the most advanced, the very latest. Man must have come to a consciousness of what the State is and what he wants. He must, then, have passed through and become acquainted with many kind of States.

But the original State is an unconscious growth, and man can no more contract about it, than he can about the growth of his own body.

In this matter of the people making a Contract with one another, the Constitution of the United States is probably the first instance, which obtained validity. "We the people" make the following agreement, which is contained in the following written instrument. And this instrument has been drawn with great care by those deputed for that purpose. Moreover the instrument is to be submitted to the contracting parties, to every individual of them, who has to accept or reject it by his personal vote. The well-known contractual formula: "We the People" is found in the first words of the Preamble to the Constitution.

The idea of the "Contract Social" shows itself in separate phases of the American Constitution. The people must ratify the Constitution, they must accept the Contract which is here written out for their approval. First, men were selected to draw up the instrument, this was the work of the Convention. They made slowly and painfully the terms of the agreement, which the individual voter had to affirm, or a majority of voters. Then in all changes there must be a similar submission and ratification. So the Contract is continued to the end of the Constitution.

The Contract is not therefore at the beginning of the State, which had been made and unfolded instinctively till the adoption of the

Constitution. Institutions grow till man becomes reflective and self-conscious, when he makes them purposely.

It is Rousseau who at one time calls the State a Person and then a Contract, though properly neither term can be applied to it. The State is not an Ego, though it be a Will psychically; yet it is not a subjective or capricious Will. The State is not to be fused or confused with its ruler, who is a Person, though the despotic Asiatic State has just this confusion, or, rather, lack of development. It is a curious fact that Hobbes, amid a number of good ideas, lapses on the whole to Orientalism in his *Leviathan*, by making the General or Social Will a Person, an individual who is the sovereign, and hence absolute and irresponsible. For the Oriental political consciousness simply recognized the institutional Will as a Person with his individual Will, hence the government was oppressive or beneficent, according to the ruler, but always despotic. And the Oriental People have no other conception of the State than that of the huge Leviathan, an enormous individual with all his passions, vices and virtues, brutality and benevolence. Hence they are not truly conscious of the State as such, which is as yet relatively implicit, undeveloped in the Oriental mind. So the Oriental State is the Universal Will (All-Will, or Will actualized), but as immediate and personal, undif-

ferentiated and unlimited within and without. Still the monarch of the Orient recognizes usually one Will over him, the divine, which, however, he conceives to be quite as passionate and capricious as his own.

VII.

The Oriental State shows the coercion of the Single-Will as subject by the Single-Will as ruler, who thus unites in himself, or rather fuses, the personal and the legal, or the individual and the universal elements of government. Hence we may deem the Oriental the undifferentiated stage of the State. Yet even in this the subject as Single-Will beholds his own Will as authoritative and universal, though the latter crush him. Thus he recognizes the majesty and sovereignty of the State, when it, as embodied in a Single-Will, reduces to nothing him as a Single-Will. His consciousness demands an absolutism with power that he may come to know the State as an objective, actualized Will.

How is it that we can define the Oriental State as actualized Will whose end is to secure Free-Will? Undoubtedly this Free-Will secured by the State in the Orient is very limited, being confined to the Monarch who is just for this reason absolute, as he is himself the Free-Will uttering and indicating ultimately his own Free-

Will through the Law, he being the Law-maker. Here is the immediate, undeveloped idea of the State as absolute Will, though it be still one with the individual Will of the ruler. The training of such a State is that man gives up his own Single-Will, which is capricious, though resigning himself to a capricious Will in the sovereign. So the People get the discipline in the Orient, not the Monarch; they through the subjection of self-will are preparing the race for self-rule.

Thus Law is implicit in the Orient, being not yet separated from the sovereign's immediate Will. But in Greece, and especially in Rome, Law becomes explicit, and utters itself in a permanent form. Roman Law in a number of ways rules the civilized world to-day, as a distinct impersonal utterance of an impersonal State giving impartial justice to all. But in the Orient the State with its Law is still personal, though also institutional; both elements are fused, which time will separate and unfold, each by itself, yet in co-operation.

The Greek sought for and fought for freedom, but it was rather the freedom of the City than of the Individual, who was to live in immediate union with his City, and thereby obtain his freedom. We may express this thought by saying that the Individual had one life with his State and affirmed himself through his State,

and not so much through himself. Hence he was deficient in the modern principle of subjectivity, the inner personal self-determination of the individual. On the other hand, he was a great advance upon the Oriental subject, who had to be one with the Single-Will of the ruler.

The Occidental State simply inverts this Oriental relation, for now it is the People who rule and the Monarch who obeys. The President's Will is subject to the Law and Constitution, which are derived from the Will of all. Each kind of State (Oriental and Occidental) is an actualized Will whose end is to will Free-Will through the Law, but the first secures just the one Free-Will, while the second secures all, and then all secure the one. Thus the Occident has in it an inner return to the Orient through the People, who mediate their absolute ruler.

Autonomy was the chief category of the Greek political consciousness, but it meant the autonomy of the City, not of the citizen. To be sure some Greeks, the philosophers, began to be personally autonomous, when the ethical spirit arose with the Sophists and Socrates; then the individual started to be a law unto himself, as well as the State.

Moreover, the Greek citizen was law-maker for his City, but not for himself within. An inner self-legislation did not arise on the Greek world as such, though it did dawn in certain

Greek individuals. Plato and Aristotle have as their ideal State the conception of the autonomous City, though they are also seeking to develop the autonomous individual. The first was their pure Greek heritage, the second was their break with this heritage and their marvelous step toward modernity.

In America the State of States asserts itself over the Single-State, as Monarch; in the Orient the Will of Wills asserts itself over the Single-Will, as Monarch. The absolute Person ruling over Persons has unfolded into the absolute State ruling over States. The meaning of this mighty transition is that the Institution must take the place of the one individual Will in order to secure the freedom of all individual Wills. In the Occidental sense there is no developed freedom in the Orient, only the potentiality of it, and also the training for it. The Occident is able to rule over vast areas, as the Orient was, not however, by the subordination of the Single-Will, but of the Single-State, which can also be capricious, and so must be subjected to the discipline of the World's History.

VIII.

Man has an impulse which drives him to the Institution, a native desire for it, which may be regarded as its individual starting-point. Sexual

love propels the human being into the Family; the wants of the body, which demands food, raiment and shelter, urge man to create the Social Order; finally, the desire for security and self-activity has impelled the race to build and to develop the State. So we find underlying all institutional life an original natural Desire or Impulse toward the ultimate end, namely, freedom.

But this first freedom of nature is capricious, an impulse quite blind, which even the animal possesses, since it too desires to be free and have the range of the forest. Man's great function is to transform this natural liberty into institutional liberty, preserving the eternal aspiration for it in his heart, yet making it over into an objective world which affirms and secures it for himself and for all. Otherwise this natural liberty, this desire for freedom, can become the greatest enemy of freedom. Here lies its negative power, through which it has often shown itself in the world as the veritable Destroyer. Though freedom be the object of Institutions, the desire for freedom may be just what assails them, seeking their annihilation. So we are to grasp the double and even contradictory nature of this desire for liberty, bringing forth from one mother the twin children, the Institution here and there Anarchy.

Homer long ago said and sang that freedom was the great boon, was the principle the consciousness of which gave manhood to man.

“The day that makes man a slave, takes half his worth away.” This of course contrasts the free man with the slave, both being taken as individuals.

Ancient Hellas, in general, sought for the means of making the individual free, and found it in the City (*polis*), whose laws were to preserve him a free man. He lived in an immediate unity with his Institution, which was to secure his freedom, not his capricious but institutional freedom. Good laws made him good; that is, institutional; hence the meaning of the Law-giver in early Greece, as Solon and Lycurgus. It was the Hellenic City that sought to be autonomous (self-legislative), rather than the Hellenic man. We have already noted how the great philosophers, especially Socrates, began to preach the autonomy of the Self, wherewith Ethics could arise. It was more particularly Rousseau in our recent period who asserted the doctrine of individual liberty for all, and made the modern man conscious of his end in the world-order. Rousseau has two sides in him, in fact both kinds of liberty as above described, namely natural liberty and institutional liberty. He would have man flee back to Nature from Society in order to get free; yet he also states that man is to become free through Society. He emphasizes the *Social Contract*, writing a book on the subject; yet in the same book he indicates

decidedly the difference between the Will of All and the All-Will, inasmuch as the very purpose of the former is to rise to the latter, which is the transition from the immediate popular Will to the mediated one through the Institution.

The State is undoubtedly to secure the Free-Will of the Individual, but not this alone; it must also secure all Institutions — Family, Society and finally itself, as being just the Institution which affirms and safeguards the institutional principle (actualized Will) through the Law.

The individual has many psychical phases of the State. Patriotism is the feeling of the State, its instinctive process in the soul. The patriotic citizen responds immediately to the universal Will embodied in his nation. Then it appeals to him subjectively as a moral being; he must do his duty to his country, subordinate his individual Will to the general Will. As a thinking being, however, he rises still higher: he sees, or, rather, creates the State as his universal Self, without which he would be very imperfect, certainly not civilized, since civilization springs from the State, as the name indicates.

But man cannot be actualized, he cannot be an actual person in the world, without the State. He may have the State subjectively in himself, but that is not actual. He may flee to the woods and keep aloof from his country, or have none; he is there an unreal man; as a Will he has no

objective counterpart, he is but a half, half a man, or the mere possibility of being a man. Thoreau in the Concord woods by Walden Pond made his protest against Institutions, and quite unmanned himself in the act. Timon, the misanthrope, also went back to the life in the forest, and so was truly tragic, a suicide of Will.

Shakespeare, who is supremely the institutional poet, has shown, beside this negative side in Timon, the positive side of Institutions. In his Comedies he often portrays a flight from the civilized order to the woods, especially when Family and State have been perverted into a world of wrong. But always there is the return to the realm of Institutions after passing through a period of estrangement; man cannot remain in alienation from that which constitutes his social being; he has to come back to the realm of actualized Will in order to be complete. In *As You Like It*, all the banished and the fugitives return from the forest of Ardennes to Family and State except the negative man, the melancholy Jaques, who, however, is put under religious discipline. No less than eight plays can be counted in which Shakespeare employs this flight from the institutional order and makes it comic, self-undoing, absurd. That is, such a negative act negates itself from its own inherent nature, and that is about the truth of it. (See our Commentaries on Shakespeare's Comedies, pp. 41, 367, etc.)

IX.

We seek to get rid of calling the State an organism as the final expression of it. Thus it drops down into the biological aspect, which leaves out its essential character. Not only Spencer, but even Hegel calls the State an organism, so hard pressed are they for terms. Undoubtedly the State is an organism, but it is something more, and this something more is the differential point. We say also body politic as distinct from body physical. But that which moves and determines the body politic is the soul politic, and this is what we wish to get at and hedge in with some kind of term or definition.

We might designate all secular Institutions as Bodies. Family is the Body domestic, Society is the Body social, State is the Body politic. Here is found the thought that the Body is an organism with its own adjective, which adjective is the main thing to be defined. But it is far better to see these as creations of the spirit — a Psychosis — for the Body itself, the physical, is also a Psychosis ultimately, and hence the bodily organism cannot be the final explanation. Even physical Science, as a whole, is yet to be seen as psychological; by no means is Psychology to be treated as a physical Science — which would be the most striking example of putting the cart before the horse.

No definition in political science has ever approached the fame of Aristotle's dictum: *Man is a political animal* (politikon Zōon). That is, man makes the State naturally, instinctively. Aristotle, having Greek conditions before him, means that man is a City-producing animal (or being), who builds his institutional abode as naturally as does an animal, for instance as the beaver does his dam. Aristotle seems to be urging this principle of instinct against Plato whose ideal City was to be constructed consciously, with the self-conscious man, the philosopher, as ruler.

On this line of thought we may conceive man as having two Bodies, as having not merely his animal Body in which his members inhere but also a political Body of which he as Person or as Will, is a member, along with other members (so called) of the political Whole. This political Body we can identify as the All-Will, not a mere collection of Single-Wills (or members) but itself a Will distinct from all individual Wills yet through them all, just as the animal Organism is distinct from all its members, yet through them all. Hence, the similarity between these two Bodies as Organisms, and hence too their very important difference.

We may observe in this matter an ascending series: (1) the physical member as arm or leg is subordinate and servant to the total Organism,

which has on its side to nourish and in its way to secure the members; (2) this total Organism next becomes itself a member and subordinate to the Self or Person, which has in turn to secure it in various ways; (3) this Self in its turn becomes a member and subordinate to a new Whole, which, however, has to secure it in its free activity, and which is the Institution. Hence the Institution and especially the State is an Organism yet something more and very different, which difference is what we must grasp along with the identity. The Institution is the highest Organism, whose members are free, self-conscious Selves, who call forth an organic world, the institutional, whose object is to secure them all associated together in self-conscious freedom.

The mentioned definition of Aristotle receives a new meaning, and a new translation with every new development of the State among men. We have not only to translate the term out of the Greek tongue, but also out of Greek life, out of the Greek world, into the modern. Literally in the text of the old philosopher, the word (*politikon*) means City-producing; later in medieval and modern Europe it would signify State-producing or Nation-producing; but in America it will have to mean, if it still be applied to man, that he produces the State which is itself State-producing. Such an evolution we may find in Aristotle's epoch-making formulation, wherein

we may see also that the definition of the State must unfold with the State.

Every Will, when it acts, implies the State, is the potentiality of government. Whatever each individual may will, or a multitude of individuals may will, they have the one common characteristic, namely, to be Will. Though men act in opposite ways, they are one in such action by being Will. This unity of diverse Wills, being made objective and existent in the world by its own inner native character (such Will is not Will unless it objectifies itself), becomes therefore a Will which is object and acts in the world — becomes *instituted*, or an Institution. Here lies the primal psychical nature of all Institutions, which we have so often called Will actualized.

But the State, which is our present theme, is that form of Will actualized whose end is to secure Will through the Law, this Law being the language of the State, the very soul thereof voicing itself to the members. It is evident that the fundamental process of the State is to make and utter the Law. We have already likened the State to a colossal Individual having authority over the sons of men, and proclaiming in one way or other his command to them, which command is the Law. Of him it may be truly said that his word is the Law. In any adequate consideration of the State, the nature of this Law cannot be left out.

X.

We hear in these days a good deal about the Laws of Nature. But Nature is not self-conscious, is not Self at all; she does not know, still less make her own Law, though she manifests it. A stone obeys the Law of Gravitation, but does not know it. Very different is the Law which the self-conscious Person obeys, knowing the same, and knowing the same as his own, which he at last has to make, and so attain freedom. In obeying the Law man comes to know that he is really willing his own Free-Will, and that only in this way can many men be freemen. Governed by Law he is self-governed, or is to make himself such, for Law too has to evolve itself from a lower to a higher stage.

Law, as here used, is the work of the State distinctively, being its end in one direction and its means in another, and including both Statute and Constitution, and even Custom. A brief discussion of the meaning and origin of Law may be given at this point, as a kind of preparation for entering upon our further unfolding of the State.

The conception of Law as set forth by Bentham and Austin makes it the command of the sovereign to the subject, imposing a penalty in case of disobedience. There is, no doubt, an element of command in the Law, but it must

have something more; such a "command of the sovereign" taken by itself, would be arbitrary. At first Law may be arbitrary, as in a patriarchal government, or in Absolute Monarchies, being the personal edict of a personal ruler. But the content of the Law has to be taken into account, that content being freedom. The form is that of an external command, but the ultimate end is to secure Free-Will. The evolution of legislation moves toward this object: the person who obeys the Law is to make the Law. Man is to become self-legislative through the Institution. Law is still the command of the sovereign to the subject, but what if the subject has risen to be sovereign and utters the Law? It is evident that he has become "a Law unto himself," not alone subjectively and morally, but objectively and institutionally. Law unfolds through many stages till it gets to be the command of the sovereign, the People, unto themselves to secure the freedom of all. So we may say in psychological terms: the Law is the expression of the sovereign Will to will Free-Will.

In like manner the character of the violation of Law changes, becoming in this last phase purposely and consciously destructive of freedom. With the deepening of Law, crime must deepen; the negative Will of the individual assailing the State, assails the Free-Will of all, and necessarily includes his own act, which is thus at bottom

self-destroying. Such an act, being of his own Free-Will, the State brings home to him, since it has to secure his Free-Will, though this be negative, and indeed negative to himself. Punishment is not to be merely the external command of the sovereign to the transgressor but his own command, the criminal through his deed commands himself to be punished.

The ability of a people to express Law varies according to its mental development. In the Orient the Law is, in general, spoken by the Monarch, or by the sovereign Single-Will to the subject Single-Will, hence is external to the latter, in form at least. In Europe the struggle has largely been to bring the sovereign Single-Will under the Law, to have sovereignty in the State without arbitrariness or tyranny. In the Occident this struggle is substantially over, the President being endowed by the Law with sovereign attributes. The Law, instead of being the command of the sovereign as Single-Will, commands him now (in the Constitution of the United States), thus making him legal and universal by taking away from him his individual, capricious side, or at least limiting it to its extra-legal sphere. Where the man is maker of the Law, he yields himself to it consciously and internally, otherwise obedience is immediate and external, from outside to outside.

Custom is unconscious Law, whose destiny is

to become conscious. When Custom is enacted, written down on the tablet or the page, and hence fixed, it is distinctively the Law. The Greek Law-giver was called a *Nomothetes*, literally a Custom-fixer, who *posits* into a Law the floating Custom. (Compare the German word for Law, *Gesetz*, something posited. Similarly the word *Law* is declared to be derived, not from the Latin *lex*, but from an Anglo-Saxon word meaning something laid down or posited.) Thus the Law-giver does not make the Law outright, but transforms it from Custom, which is, so to speak, the plastic material given him to fix into the permanent shape of Laws. Thereby the people get to know the Law, and become conscious of themselves as institutional, reading and hearing it, discussing and enacting it in their Assembly.

Properly Custom belongs to the primitive Village Community, which finally transmutes its Custom into Law through the Law-giver, and is thereby itself transmuted into the City-State. The work of Solon and Lycurgus, Law-givers of Sparta and Athens, was essentially of this nature. Aristotle notes the same transition (from the *kōmē* to the *polis*). The true rise of the Greek City-State seems to be co-temporaneous with the appearance of the great Law-givers in Greece. The same word (*nomos*) in the Greek tongue is used both for Custom and Law; as is often the case, the new meaning clung to the old word,

which thereby came to have two senses. It signifies originally *something allotted* — allotted to the individual by his Community (or Tribe or Nation). But as he unfolds towards and into self-consciousness, this *something allotted* must be taken up by and passed through his Self, his Ego, and be re-enacted by him, so that it is no longer simply given to him from the outside, but is made his own consciously. Here, then, the History of Greece can begin, telling now of a State with its Laws, as well as the doings of the self-conscious man in the struggle for freedom.

Such is the general movement: from the Custom of the primitive Community, through the enactment of the individual to the Law of the State. Greece by no means completed this movement, which is yet going on; still she showed the first European stage of it. In this connection we may refer again to Sir Henry Maine's formula of the same movement: from Status to Contract. This seems incomplete as already said; rather let it run: from the instinctive Institution with its Custom, through the consent of its members, to the conscious Institution with its Law.

The Roman naturally connected his Law (*Lex*) with reading (*lego*), though etymologists refuse to accept such an origin of the word. The Twelve Tables of the Law were set up to be read, and thereby was developed the legal spirit of the

greatest Law-giving people. It is fundamental for the citizen to read the Law, hence too the meaning of the school in teaching all to read. In reading the Law I become conscious of the institutional Will commanding me, which command, however, I am to realize as my own. It is not the Law of Nature, nor is it directly the Law of God; it is the Law of the State, whose ultimate purpose and content is to command all men to will the Free-Will of all.

Still we must keep in mind that the State is not strictly a Person, though it has to be *personified* (made to act as a Person through a Person). It is a well-known spiritual characteristic of the Romans that they were *personifiers*, both in the literary and the political sense; their gift was to make an abstraction act as a Person, and hence to endow their abstract universal Law with personality. To be sure this abstraction has first to be made from the concrete world, then internally appropriated, and then re-embodied or personified. For instance, Law must first be made impersonal, abstract, general, whereby it is freed from its particular or personal side; as thus formulated it must be read or heard, and understood; then it must return to the personal principle, being specially applied by the Person to the Person; or *personified*. It is the function of the State to find this Law in the personal, to make it impersonal, and then restore it thus universalized to the Person.

This movement we have already seen in the reflexive action of the State as Will, which, after being focused in the Institution, is to return and secure what made it and is still perennially making it. This focusing of all Wills in one Will which is actual, is what we have already called the All-Will as distinct from the Will of all. Yet this focused Will must also will something, namely, the free activity of all Wills, from which it sprang and to which it returns.

In this connection we may cite a thought of Rousseau: "The Law creates the social spirit which primarily creates the Law." Neither creates the other externally and separately, but each creates the other in the process of the Institution, which as Law-creating and Law-created, must be the State.

XI.

Taking a glance back through these Preliminary Topics, we may summarize the main matters and connect them together, and perchance add a thought or two.

(1) The psychological point of departure is the Will as a form of activity of the Self. Of its own inherent logical movement, the Will must not only produce something existent but must produce itself existent, as an object in the world.

(2) This is the Institution, which is the Will actualized or Will willing Will, whose end is the freedom of all through itself, i. e. the Institution. Here rises to view the distinction between capricious and institutional freedom. But there are various Institutions, and so these must be distinguished, each according to its own creative thought.

(3) The State is the Institution whose function is to secure man's activity through the Law; or it is that form of actualized Will which utters a command to all that they will Free-Will. At least such is its ultimate purpose. This law as the voice of the State shows itself in various grades of evolution as Custom, Statute and Constitution.

(4) The State, at first a product of man's instinct and hence an unconscious growth, rises to being the State-producing State, with a Constitution having such a purpose more or less consciously. Thus the State is to be not merely self-preserving but self-propagating, and so becomes truly the genetic State, the State of States.

(5) The first appearance of such a State in History is the American State in its duplicated form of Single-State and United-States. Thus State individualism has been brought under Law, and made altruistic, that is, made to will the freedom of other Single-States as one with its own.

(6) The citizen is secured not only by his own Single-State, but by all the other Single-States willing his Free-Will through the Constitution. On the other hand he must know and will and finally govern this double, or indeed triple movement (including himself), of the American political system. And this is also his best education, quite unknown and impossible in any other form of government. For he must know and manage this intricate organization of his State, so that not only his training but his heredity is that of an organizer.

(7) An old thinker said that "the political Art was the most architectonic art," requiring a constructive power greater than any temple or edifice. In fact it was the State anciently which built the grand edifice or temple, even if it were for religious purposes. Egypt, Greece, Rome, manifest the mighty constructive energy of their State in their massive buildings, the ruins of which still testify to their "political art." Architecture at its best is the structural character of the People turned outward and made visible in stone or other material.

(8) The United-States is not simply a Federal State, though it is this, too. It started as a Federal State, being composed of thirteen pre-existent Single-States. Federalism, as such, has been known in Europe a long time; already in ancient Greece it attained a high development in the

Achæan League. At present there is a strong federal movement in Europe. But the distinctive fact of the history of the United-States is that the Federal State unfolds into the State-producing State.

(9) The result is, the American State is the most adequate securer of Free-Will that man has yet devised. Hence Americans believe in their State with greater unanimity than any other People, though they are often dissatisfied with its administration, for which condition of affairs they must ultimately blame themselves. But there is not an important European land without a large and intelligent body of its own citizens (not anarchists nor even socialists) who question the form of government under which they live. With the exception of England, the difference in political parties secretly reaches down to a difference in regard to the State itself, rather than in regard to its policy, which, however, is what is openly discussed. The Anglo-Saxon State, in general, seems to be the only form of government which at present satisfies its People, though this is not saying that it is not capable of further improvement, or is not still in the great evolutionary process of the ages.

(10) Since "the political art" has been of old deemed "the most architectonic art," we are primarily to set forth the structure of the State, whereby the student beholds its inner,

spiritual architecture. Under this image we may call the Constitution a fair edifice, a kind of Greek temple in its simplicity, whose fundamental order and symmetry are to be brought out in any adequate exposition. Accordingly we shall pass from the somewhat discursive manner of these Preliminary Topics to a more strict development of our subject, tracing out in some detail and emphasizing the structural divisions of the work before us, and ultimately carrying them back to their psychical origin.

Part Second.

THE CONSTITUTION OF THE UNITED STATES.

The best explanation of the meaning and end of the State in general may be found in the last particular manifestation of it in the movement of History. The evolution of the State is what mainly reveals itself in the occurrences of History. The last State in the true historic continuity will naturally show more completely than any earlier political form the original idea of the State. The American, at least, believes that his government is the highest political development of the present. For him, then, the best preparation for the study of political science is the Constitution of his country.

A great advantage in such a study is the brevity of the Constitution, which makes it the point of concentration for much that went before, and the point of development for much that has come after. It is a written Constitution, compact of form and meaning, but underneath this written Constitution lies a long-extended unwritten Constitution, going back to the Colonies, to Great Britain their mother country, even to Teutonic and Aryan antiquity. The entire political movement of the Aryan race breaks into one terse, mighty expression of itself in the American Constitution, and moreover sets itself down in writing, which is made to formulate not merely Law, but the Law-creating Law, the Law of Laws, for us at least.

When we survey the Constitution as a whole, we cannot help noting the order in it, through its divisions into Articles, Sections, Clauses. Everything seems to have been carefully put into its place and arranged into cognate groups. Organized thought is the whole of it, seeking to show all the joints of the subject, large and small. These masses duly measured off into different sizes and arranged with a certain symmetry of parts, give to the Constitution an architectural cast, which adds decidedly to the impression it makes. In one sense it may be called a work of art; it has order, proportion, symmetry, harmony, and thus on its purely struc-

tural side does not fail to appeal to the sense of the Beautiful. We hold that this is one element of its enduring power and influence, and suggests one reason why the People are so unwilling to tamper with their great national Work of Art.

But the language is not poetical but legal, and hence prosaic, while the contents appeal, not to the imagination, but to the abstract understanding. The structure, however, remains, and is the first matter to be looked into. The most general division employed by the Constitution itself is the Article, and of these Articles there are seven, barring Amendments. At once the question arises, What is the order or movement in these seven Articles? The first is quite long, but the last is one brief sentence, the intermediate five being of various lengths. The Articles at most suggest the general topics, but what we want at present is the common principle running through them all and organizing them. This can ultimately be none other than the process of the Self, which both made the Constitution and is that for which it was made. Herein we reach down to the psychical fact which must of necessity organize the instrument.

In this connection the first matter to be noticed is that the Preamble stands quite by itself in form and purport, and yet is an organic member of the whole. Its structure, not grammatical but spiritual structure, is distinct; it does not yet

command, as do the succeeding clauses, but gives the reason for such commands. We do not yet hear the imperative *shall* which runs through the Constitution from beginning to end, and unifies it in a line of commandments from the sovereign. Now the Preamble tells who this sovereign is (*We the People*), and why he issues the edict. Very remarkable is the change from the olden time when Moses heard the voice of God from above and transmitted His commandments below to the People. For now the People themselves, the whole of them, seem to be above and are delivering their commandments in the new kind of thunder of Sinai. Such is the grand difference between Orient and Occident in this matter of Law-giving; still the Law remains, though the manner of it be changed. The Preamble then, contains the original Conception or Idea of the maker of the instrument, the creative Thought which called it into existence.

The next leading fact which comes to view in an organic glance over the Constitution is a division or group embracing the first three Articles, which give in due order the threefold governmental Powers—legislative, executive, and judicial. These are not only three Powers, but threefold, each and all. Here we may observe the most obvious sign of order and symmetry in the whole Constitution, and of the three the legislative Power is wrought out with the great-

est care and fullness. All three Powers, however, constitute one process which enacts, carries out and confirms the Law, making it absolutely valid for the People till the latter through this same instrument revoke it. Such is the inner Constitutional Process, whose grand result is the Law in its completeness, realized and set to work in the world. By way of illustration we may call it the machine for formulating and establishing the legal commands of the State, which are the product of this Process.

Every attentive student will observe that this well-ordered and well-rounded inner Process of the Constitution comes to an end in the Third Article, and at the beginning of the Fourth Article a new subject-matter and a new stage as well as a new arrangement sets in. There can be no doubt that the previous strict ordering of the Constitution breaks up, and a kind of uncertainty makes itself felt, the uncertainty of the future with which the framers now have to grapple. The Law-producing Process just described does for the old States and makes out of them the Federal Union, but this is by no means enough, indeed, is not the highest purpose of the Constitution. What about the new States which are to come into existence, being produced out of the vast territory reaching to the Mississippi, and then beyond it to the Rockies, and still further beyond to the Pacific, and that is by no means the

limit of this movement of expansion? Clearly the new Union is to be State-producing, also, and not simply State-uniting — and this is really the third grand division of the Constitution. Thus we have a Union which is not only created by the Single-State, but which creates the Single-State. In the first case it might be dissolved by those who came together and made it by agreement; but in the second case, when the Union has become the mother of a large and determined family of children, the latter will have a word to say when it comes to a dissolution of the Union to which they owe their origin. Whereon the history of the Civil War is one continuous commentary.

It will be inferred from the preceding statements that there are three grand divisions of the original Constitution which likewise constitute the one movement of the whole instrument. As this thought is the fundamental one, we shall recapitulate it in brief terms as follows: —

I. The Conception of the Constitutional State as the Union of States, whose ultimate end is to secure “the blessings of liberty to ourselves and our posterity,” or to will the Free-Will of all more adequately by this new State. — The Preamble.

II. The Law-producing process of the Constitutional Union, setting forth and ordaining the triune movement of the governmental Pow-

ers — legislative, executive and judicial — which produce Law in its completeness. Here lies the principle of the Federal Union as such, federating and unifying the already existent States into one self-governing Whole. — The first three Articles.

III. The State-producing (or reproducing) process of the Constitutional Union; the third act of the total movement in which the Union returns upon itself and keeps reproducing itself in a never-ending cycle, obtaining its aliment (as it were) through a continual taking-up of new States, which through the Union become themselves State-producing.—The last four Articles.

In brief we may say that in the Constitution the Union-producing State (or States) passes over into the State-producing Union through the organization of the three governmental Powers which enact, execute and adjudicate the Law. In the Preamble we hear the purpose and the promise of the Single-State or the States as such to be Union-producing, since the expression “to form a more perfect Union” implies the States so forming the Union. The People, who are specially mentioned, form the Nation, while the States form the Union.

Underneath this written Constitution is an unwritten past Constitution, its inheritance from the ages; but there also lurks in it an unwritten future Constitution, which has been evolving itself since its adoption and is still evolving itself,

which probably is yet to be written in the fullness of time. Especially the Third Division of the Constitution (as above parceled out) is at most but a meager outline or prophecy of the State-producing Union, which in its very silence leaves room for the coming growth, and which has unfolded so marvelously in the century and more since the making of the Constitution.

The division of the Constitution into Articles, Sections and Clauses, seems to have been suggested by the division of the Bible into Books (or Gospels, Epistles, etc.), Chapters and Verses. Thus it was made a hand-book for ready reference, and separated into pithy sentences for the People. It must be so put as to stick fast in the popular memory, every statement of it; hence it became truly a secular Bible which every citizen thumbed and conned and often knew by heart, as he did his religious Bible. For ultimately he was the ruler and felt the responsibility of rule; the People finally could reverse even the Supreme Court, and did so in a famous case, that of Dred Scott, to be sure in an ultra-legal way, for the limit of legality was reached and had to be transcended in order that the new Law might appear. The voter too has to discuss constitutional questions at every great election and finally to decide upon them; so he must know the source of them and the criterion of their validity. Hence there must be the Public School so that

every man may be able to read his two Bibles, the religious and secular, not to speak of their commentators.

Moreover the Constitutional Convention of 1787 consciously purposed and intended all this minute division and ordering of the instrument. This is indicated among other things by the appointment of a Committee on Style. Likewise the man specially fitted for such work was brought to the surface by the emergency which seemed to select him just for the purpose — Gouverneur Morris. More about this interesting matter later.

So the great inner political separation from England takes place consequent upon the outer political separation. From the unwritten implicit English Constitution, unseparated from the Law and from Parliament, comes forth the written, explicit American Constitution, which is Law-producing and also State-producing. Conceived indeed but not yet really born is the English Constitution, but the Convention of 1787 performed the grand obstetric act, bringing the child into daylight where it belongs, and making it visible to the whole People to whom it belongs. At first disowning with scorn England seems now ready to acknowledge the child with some maternal pride in the lusty youngster, and she may yet even adopt it.

The State-producing State, just by virtue of

its capacity for creating States, is not cooped up in a limited territory, like the governments of the old world, which extended their possessions by conquest and subjection of other States, and not by the reproduction of equal States. Moreover, the larger the association of men in the State, the more adequately does it secure Free-Will. The more extended and populous the country whose Union of States makes the Law, the more complete is the freedom of the individual. It is more safe when safeguarded by many than by a few, and it is safest of all when safeguarded by all through the Institution. Liberty started especially with the ancient small City-State of Greece, and has manifested itself under various enlarged forms in the later European Nation-State. Its present culmination, however, is seen in the American State of States; but even this is not yet the Federation of the World, or of the Continent, though some such Union seems to be looming up cloudily out of the distant future. "To secure the blessings of liberty" is indeed the genetic starting-point of this great institutional movement, and the creative Conception of our Constitution.

We shall now proceed to set forth the three foregoing Divisions of the Constitution in their distinction and also in their unity which is a process, ultimately a psychical process. The Union-producing State would not have produced a Union

in any permanent sense, unless that Union had also been State-producing, had gone back and re-created its very sources, thus completing the process of itself, and thereby making itself truly self-determined and independent.

FIRST DIVISION.

The first main Division of the Constitution we confine to the Preamble which is differently organized from the rest of the instrument, being called neither Article, Section nor Clause, having in it no commanding *shall*, though in its first words the new sovereign announces himself in person and gives his grounds for the forthcoming imperial fiat, since he desires to be rational in the present matter and not arbitrary.

Since we regard this Preamble as one of the co-ordinate three main Divisions of the instrument, we shall treat it quite fully. It expresses the original motive and purpose in the soul of the people, and so has a special value in a psychological fathoming of the work before us. Here it is:—

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

This is a single sentence, and one of the most unique and successful in the whole Constitution. It reaches back of the instrument to the

purpose and conception which called the same into existence; it penetrates to the spirit of the People and declares what they had in mind when they made and ratified the Constitution, for undoubtedly this Constitution sprang from the American People. The Preamble is a part of the instrument, its first, creative word, suggesting its primordial source in the folk-soul which is indeed the original fountain of States, Laws, and Constitutions. "We the People" utter the fiat of a new creation in the institutional order of the world, having now for the first time fully gotten a voice in our own destiny.

This Preamble was often cited by Chief Justice John Marshall, altogether the greatest interpreter of the Constitution. Says he: "The government of the Union is a government of the People; it emanates from them; its powers are granted by them, and are to be exercised on them for their benefit." (*McCulloch v. The State of Maryland*, 4 Wheaton.) The Union is created by the Will of the People, and is itself a Will which is to return to them and "be exercised on them for their benefit," which benefit must be ultimately the securing their freedom. Judge Marshall in the same decision declares: "It is the government of all; its powers are delegated by all; it represents all, and acts for all." It is indeed the All-Will (as heretofore set forth), whose function is to safeguard and to confirm

the free activity of all. The above expression of Marshall seems to have been the unconscious source of President Lincoln's famous dictum: the government of the People, by the People, for the People.

Another great expounder of the Constitution was Alexander Hamilton, who says: "The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow from that pure, original fountain of all legitimate authority." (Federalist, No. 22.) Hamilton further contends that one of the infirmities of the Confederation was that it had never had a ratification by the People, as it was founded only on the consent of the several State legislatures.

We may conclude that this Preamble, giving the very genesis and originative starting-point of the Constitution, was deemed of great importance by its promulgators. A little further study of it will not be without value. We shall find in it three main thoughts: (1) The source of the instrument; (2) what the instrument is, with its full title; (3) the objects in making it, of which six are mentioned. To each of these thoughts we may add some explanations.

I. The source of the instrument is uttered in the first words: *We, the People*. It is the original act of the popular Will which creates the Institution, and which is like the divine fiat which

bade chaos become cosmos. Religious folks may well deem it God's Will in the present case, and here, if anywhere, may be applied the maxim, *Vox populi, vox dei*.

One should also note the suggestion of a contract which lies in the formula, *We, the People*, though the whole sentence is the command of the sovereign. The idea of the contract as the beginning of the State came down through Europe from the Roman lawyers, and was given universal currency some years before our Revolutionary War by Rousseau in his *Contrat Social*. There is hardly a doubt that this idea of a contract tinged the Constitution, as a number of its most influential framers had a goodly share of the French culture, notably Hamilton and the Virginians. It would seem that a large part of the historical erudition of the *Federalist* came through French sources. One can hardly help supplying the undercurrent of thought as follows: "We the People *do hereby agree with one another* to ordain and establish, etc.," which brings to the surface the lurking contract, the supposed beginning of States and Constitutions.

It is next to be noticed that this Preamble puts strong stress upon the United States, and the Union; the People are People of the United States. The Single-State is not mentioned, though of course implied; the Constitution was made by delegates from the Single-States, and

they voted in the Convention by States. Still the Constitution was not to be presented for adoption to the Congress of the Confederation or to the State Legislatures. The latter were to call a Convention specially elected to consider the Constitution, which was thus referred to the People through the Single-State, as the latter could not well be a judge in its own case concerning its functions and duties toward the Union.

The problem here suggested came up early for decision in the Supreme Court of the United States. Is the Constitution a compact of sovereign States which have delegated certain powers to it, or does it go back to the People? The decision alluded to runs: "The Constitution of the United States was ordained and established not by the States in their sovereign capacities but by the People of the United States." (1 Wheaton, p. 304.) Hamilton declares (*Federalist*, No. 22) that there was "the necessity of laying the foundations of our government deeper than in the mere sanction of delegated authority," which might be revocable at the pleasure of the Single-State. Very plainly does it appear that this reference of the Constitution to the People was meant to cut the doctrine of State sovereignty out of the instrument.

Still the doctrine remained and finally brought

forth its fruits in secession and Civil War. But it is very instructive to see how careful the fathers were to get rid of this apple of discord, and one of their chief means lay in these first words of the Constitution: *We the People*.

It is manifest that three lines of authority have shown themselves in the preceding exposition: (1) the People, (2) the United-States, (3) the Single-State. The latter, though put out of the Preamble, rose and fought in the Courts and in Legislature, and finally in bloody battle, in which it was again defeated. Still the Single-State with its rights is an integral part of the national system, and is continually reproducing itself (in new States) through that system.

The People are the foundation, the elemental principle, the creative source of the constitutional fabric. Its act of Will is what produced and keeps reproducing the governmental Process of Life.

II. We are next to look at the action of the People in making this instrument and what the latter is by name.

We observe, in the first place, the strong emphasis upon the act of Will, expressed in the resolute words "do ordain and establish." The People considers itself as a kind of Person in the process of doing the great institutional deed, and speaks of itself to itself concerning its intentions. The vast Body Politic has here a voice and de-

clares its command. Psychologically it is the Will of all (or of the majority) transforming itself into the All-Will, which is the Institution. For the Will of all as single units of individual Will, is very different from the All-Will, which is the one supreme organic Will in itself, namely, the State, which commands all these single units of Will through its Law.

In the second place we should observe that this has become a self-conscious act on the part of the People. It addresses itself and others about what it is doing, and is aware of its own ends. The People, knowing itself to be free, proposes to make an organic Law which is to secure that freedom. In the act of self-consciousness it beholds its inner spiritual Self, sees what it wants, and organizes its instrument. The People is now to be grasped as self-conscious Will, which is actualizing itself in a new Institution, and this latter is to utter the new Law governing the People.

Here we come upon the fact that this instrument is in writing. The written Constitution is explicit, developed, a new stage in the political movement of the world. In this fact lies an inner separation from Great Britain as significant as the outer separation through the War of Independence. The British Constitution is unwritten, is unseparated from the vast body of the Law; relatively it is unborn, still in the womb of its

mother. But now comes a Constitution actually into the world, to be seen and read of all. Thus the People can see and know and judge of the fundamental Law by which they are governed. For self-government cannot be complete without this self-conscious activity of the People, who must behold themselves in what governs them. In black and white here lies the instrument, brief and clear in outline to the humble mind, yet calling into exercise the profoundest talent to fathom its deepest depths.

In the third place the instrument names itself in this Preamble, and also names the country — the United States of America. In the last designation there lies a prophetic outlook, as if the new world were at last to form one Union of States founded upon this instrument. A far-reaching assumption it is, yet in the main acknowledged in Europe, which generally calls the inhabitants of the United States *Americans* — often with stout protest from the Spanish-American States. Let us not fail to note in the present connection the psychical fact that this self-naming power proceeds from self-conscious existence.

One may well begin to ask here: What is a Constitution? To unfold such a definition properly would require a long history, since Constitutions form a line in the evolution of ages from the beginning of States. At present it may be

said that a Constitution is not the government, not the law, rather is it the Law of all Laws. Every form of State has its Constitution, even if unexpressed; for it is the very thought or genetic conception of the political Institution in its fundamental process. To find such a process, which is ultimately psychological, in this Constitution of the United States, is the object of the present exposition. Here, however, we may conceive it as that act of the People's Will which creates the State, and constitutes the living, ever-active soul of the State. In a sense the Constitution must have existed in the soul of the People before its realization in the instrument; yet it is the Constitution which is going to mould the future State and produce the real United States.

III. The Preamble gives the objects in framing the Constitution, six in number. Herein lies a direct reference to what was in the mind of the People impelling them to the present act. This is a reaching back to their intention, to their consciousness as determining their Will. Hence these six objects or ends have been often employed in interpreting the Constitution.

The first object is "to form a more perfect Union." This indeed strikes the key-note of the whole Constitution. Previously there had been separation in excess, now nationality must be called into existence in a central government.

Still there is no design to destroy the Single-State within its just limits. But the Single-State is not to destroy the Union. This is the grand conflict which is to be harmonized before a Nation can arise.

The comparative "more" points back to the Confederation; this Union must be "more perfect" than that was. It was the Congress of the Confederation that called the Constitutional Convention for the purpose of forming "a firm national government * * * adequate to the preservation of the Union," which was then crystallizing in the mind of the People.

So we have this fundamental note struck at the start, to which the whole Constitution is to be attuned. If discords spring up, they must be resolved by bringing them into harmony with the "more perfect Union." For instance, if a man levies war against the United-States under the protection of the *Habeas Corpus* clause, this must be set aside in view of the supreme end of the entire Constitution.

In expounding the instrument this phrase, expressing its greatest object, was repeatedly cited by Chief Justice Marshall. And during the Civil War the demand for "a more perfect Union" became a call echoing out of the Constitution and summoning its defenders.

The object "to form a more perfect Union" was clear to the consciousness of the framers of

the Constitution, who thereby represented the Single-States as Union-producing. More remote from them was the idea of the Union as State-producing, which is not mentioned in the Preamble, but will be developed out of it or out of the Union here designated as the first object of the Constitution. The first object, we say, yet not the last or the deepest, for even a more perfect Union must be finally a means for a more perfect liberty. So we pass to consider the other objects mentioned, expressing the ends or motives of the People in establishing this Constitution.

Under the Articles of Confederation there was no separate Judiciary; hence it was necessary "to establish Justice" in the new order. Nor was there any executive Power in the Confederation which could "insure domestic tranquillity," and also "provide for the common defense" against external enemies. "To promote the general welfare" is indeed general, and is one of those phrases which have evoked the strict and the loose constructionist of the Constitution. In these four intermediate objects we have a call for both a national Judiciary and a national Executive, and both will appear in the forthcoming instrument. The legislative Power already existed in the Confederation, and did not need to be specially called for in this Preamble.

We have now come to the final object of the Constitution, as stated in the Preamble. This is

“to secure the blessings of liberty to ourselves and our posterity.” Such is, indeed, the supreme end; if the first or most direct end was the formation of the Union, this Union itself has a further end, which is ultimate, namely, liberty.

It is manifest that this liberty is institutional liberty, not the caprice or license of the individual. It is the liberty through the Constitution and the entire political organization arising from the same; thus it is the most completely institutionalized liberty that has ever existed in history. The immediate Will of the People has to be mediated through the whole line of Institutions, up from the township to the Constitution of the total Union. The present phrase, then, expressly declares as the last and indeed highest object of the Constitution to be the securing of Free-Will.

Let us trace the complete round of this process: the Free-Will of the People actualizes itself in an Institution, the State, whose grand end is to secure Free-Will, or “the blessings of liberty,” through this Constitution and the Laws emanating from it. Or, to use another form of statement, the Will of each and all utters itself creatively in an All-Will (the Institution) whose function is to return and secure the Will of each and all. This is the complete psychical process of the State as Will, which is to will Free-Will through the Law.

It is true that a bare majority adopted the Constitution, hence some one may say that it is not the Will of each and all. Still there was behind the vote the agreement to abide by the Will of the majority; else an election would be meaningless. Thus it is the Will of each and all to accept the Will of the majority, in fact, an election is just the means whereby the Will of the majority is transformed into the Will of the whole Nation. A triumphant party gives justice and good government, not only to its own members, but also to those of the opposite party; it is to will the Free-Will of all, otherwise it destroys the very end of the State. Partisanship may indeed seek to confer "the blessings of liberty," not upon the whole, but upon the part or the party; then follows, sooner or later, disintegration in the party, or revolution in the State.

Another point should not be neglected in this connection: the People are here made to declare their supreme end, liberty, and also to designate the institutional means for its establishment. That is, the People have now become aware of their own purpose and lofty destiny; they are no longer a lot of unconscious tribes urged forward by a blind instinct toward their national goal, tumbling over one another in defeat and conquest, as seen in the wild spectacle of History. They know their own mind; they have become politically self-conscious as a People, distinctly the

first of the kind. This will become the profound characteristic of the present People and their government; they are the self-conscious Folk in the political sphere.

Thus of these six objects stated in the Preamble, the last is all-inclusive, and dominates the rest. The general welfare, justice, national security and domestic tranquillity, finally the Union itself show themselves at last as diverse means unto the one great end, liberty. But we must be careful to recognize the nature of this liberty as here designated: it comes through the Constitution and the enactments emanating from it, and hence is institutional liberty.

The Preamble further indicates that the following Constitution is a mere proposal to the People, who are to accept or reject it. The Convention had no power to force its work upon the People, who individually must first become parties to the agreement (or contract) by their votes. The ratification clause, the last in the instrument, should always be added to this Preamble for the sake of showing the complete act of the People. So we have the beginning and end, the Alpha and Omega, of the written Constitution, namely the Will of the People.

This ratification had to use the Single-States as its means; but Calhoun and his school affirmed that the Single-State in its sovereignty was the ratifier and not the People ratifying

through the Single-State. Thus a kind of aristocracy, not of a class of men, but of the Single-States, was sought to be erected against the People on the one hand and the Union on the other. John Marshall was the mighty protagonist in combating this view of the Constitution.

Undoubtedly the Single-State is present, is the intermediary in the series, having its place between the People on the one side and the Union on the other. The Constitution presupposes the Single-State creating the Union, and then the Union in turn creating the Single-State. The Constitution produced by the Single-State — the old one in the East — will be itself endowed with this productive power and will reproduce the Single-State — the new one in the West.

So the People becomes institutionalized, or rather institutionalizes itself. It is not a mass of individuals dictating directly law and justice, as were the ancient democracies of Greece and Rome. It is mediated both through the Single-State and the whole United States, if need be. Says Chief Justice Marshall on this point, in a decision already cited: "No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of *compounding* the American People into one common mass." Still this does not hinder him from saying that the government of the Union is truly

and emphatically "a government of the People."

Thus we have to co-ordinate and to bring into one mutually co-operating process the three elements: first, the People as the primal elemental Will-power; secondly, the many Single-States, the intermediate principle, which is to become unified in the United-States, which is the third power returning and securing the other two.

In this connection we should note the growth of this Preamble out of those going before it. The Articles of Confederation are preceded by the following words: "Articles of Confederation and Perpetual Union between the *States*," of which thirteen are named. Then in the first draft of the Constitution (the report of the Committee on Detail) the Preamble says: "We, the *People of the States*," naming again the thirteen. In the present form of the Constitution is found simply: "We, *the People*," both the names of the several States and even the word *States* being omitted. Evidently here is a movement, doubtless reflecting public opinion, which looks toward the subordination of the Single-State to the Union, though by no means its suppression or absorption into the Union. Of course thirteen States could not be named when it was settled that any nine States adopting the Constitution could form the Union. This was a good reason for omitting the names of the States from the Preamble, but not for omitting the word *States*;

which was suggested in the first draft, and must, therefore, have been struck out with design.

Neither too much nor too little should be inferred from these omissions. It was not the intention of the framers to construct a kind of pantheistic Union in which the individual State should be swallowed up, or become a mere administrative division of the central government. Such a view would contradict the whole movement of the Occident, and be a relapse to the Orient. At the same time the Single-State cannot be permitted to nullify or destroy Union; its selfhood is not only permitted but secured through the Institution of the United States. The Single-State, also, like the individual, must obey the Law, and through this obtain its freedom. Secession was a colossal manifestation of State-caprice.

It is, then, plain from the present Preamble that the caprice of the individual State (which it often called its freedom) is to be subordinated to this new Law above it, the Constitution, in order that it too may become truly free in association with other States. What the caprice of the Single-State might presume to do, is shown in our earliest history by the conduct of Rhode Island, and in our later history by the conduct of South Carolina, and examples could be found in other States. But a new Institution has dawned. As the individual man long ago had to subordi-

nate his caprice (which he often called his freedom) to the individual State for the sake of freedom, imperfect though it might be, so the time has come when the individual State in its turn must surrender its caprice to a yet more exalted Law for the sake of a more perfect freedom.

Such is our first main Division of the Constitution, which we co-ordinate with the other two Divisions, though it be quite distinct from them in form (not being a command) and in purport (declaring the motive or end of the People in making it). Still it is the first stage of the total constitutional process, from which we proceed to the next.

SECOND-DIVISION.

What we have designated as the second general Division of the Constitution begins just after the Preamble, and takes up the three Powers of Government, giving to each of them one Article. Thus the present Division embraces the first three Articles of the Constitution.

It is evident that here is a purposed order more distinct than in any other portion of the instrument. The members of the Convention came together with these three Powers in mind and more or less fully elaborated. The Constitutions of several States had insisted upon the separation of these three Powers and their independent co-operation in the working of the State governments. In the *Federalist* (No. 46) a paper by Madison cites a number of these State Constitutions which emphasize this point.

Moreover, in the same paper Madison introduces the great authority upon the subject, Montesquieu, who derives the three Powers from the British Constitution, and sees in them the bulwark of all liberty (see *Esprit des Lois*, Book XI, 5, 6). Locke had already pointed out the three Powers in his treatise on *Civil Government*. But these writers had, as usual, been long before

anticipated by an old Greek thinker, Aristotle, who in his *Politics* (Book IV, c. 14), very clearly distinguishes the governmental Powers into deliberative, executive, and judicial. He seems to make a similar distinction in his recently found work on the *Constitution of Athens* (c. 43). Still we are far from saying that this idea of the threefold function of Government was fully developed in the mind of the ancient philosopher. On the contrary, it is there but a germ which had to wait two thousand years and more ere it came to fruitage. It is, however, important to note that in this case as in so many others the ancient Greeks were supremely the germinal people, furnishing the seed-thoughts as well as the seed-actions for all future time — a kind of archetypal nation pre-figuring creatively what lay in the coming ages.

We should add that in spite of Locke, Montesquieu and Blackstone, the British Constitution is not now regarded, even by British thinkers on politics, as having the threefold division of the Powers above mentioned. Bagehot in particular has given his learning, his logic, and his humor, to dispelling such an idea. In the first place, the British Judiciary is in no sense an independent, co-ordinate branch of the Government. In the next place the executive Power is completely merged in the legislative Power, which is declared to be omnipotent in the British Empire. And

the Constitution itself is not a separate, dominating Power over the Legislature.

Still the great political evolution of the ages was just this division of government into the three Powers. The idea in Europe had gone in advance of its practical realization, as is seen in the case of England; but the idea had become fully realized across the Ocean in the new world. The American States before the adoption of the Constitution were governed by this threefold idea, and the American mind was so full of it that it was the first thing declared and established in the Constitution. When, therefore, Edmund Randolph of Virginia presented the first plan of a Constitution, whose fundamental resolution was "that a National Government ought to be established, consisting of a supreme legislative, executive and judiciary," he struck the ground-tone of the American political consciousness of the time. This was indeed the first thing to be done, and it stands first and most complete in the instrument, and was the first resolution adopted in the Committee of the Whole of the Convention.

But if the above resolution be scanned closely, there will be found in it a great new step forward. The Government was to be a *national* one, and it was to have these three Powers *supreme*. That is, supreme over the three corresponding Powers of the Single-States, at least in

certain designated matters. Thus the double government begins to show itself, State and National, and the citizen is to be put under two kinds of sovereignty. This was indeed a novelty in the world's history. Two kings had been known in Sparta and two consuls in Rome; still there was but one State and one allegiance. But two different kinds of States, one superposed on the other, yet both constituting one system, suddenly appear in the political horizon. A double star one may deem it, two suns, each revolving about the other in its own orbit and both centering around themselves a vast planetary system in perpetual revolution.

But the third party to this duplicated State must not be left out: the People, from whose consciousness it sprang and who, therefore, created it. This was the way in which they wished to be governed, or rather to govern themselves. And the chief reason was that it was the best way, probably the only way, by which a vast territory inhabited by millions of men could have self-government as one nation. It had been generally maintained by both ancient and modern political thinkers that an extensive country was unfavorable to free institutions. Even Montesquieu held some such opinion which was cited by those opposing the adoption of the Constitution. But Hamilton maintained that in the new order the enlargement of the sphere in-

creased the excellence of the republican form of government. Thus the new principle is that the area of freedom must be great and no longer confined, must indeed be always propagating itself over fresh territory; so the coming State is not only to be self-preserving (which is after all a kind of selfishness), but self-producing and self-imparting, with a truly missionary zeal.

There is no doubt that this duplicated State (the Single-State and the Union) increases the complexity of government, making its machinery vastly more intricate. But only by these means is the great end of the State, the securing of Free-Will through the Law, adequately attained over a wide domain. Hitherto in the great river-valleys like those of the Euphrates and the Nile, the government has been despotic. But now a political implement has been found by which a river-valley larger than any in the Orient can be won for free institutions. On the other hand the training in organizing power and great combination which is imparted to the citizen who has to work such an instrument, is altogether his greatest education.

So we come to consider in detail the three Powers, which the Constitution arranges as follows:—

- I. Legislative.
- II. Executive.
- III. Judicial.

There is some question about this arrangement. The Powers are not always named in the order just given. In some governments they might be arranged otherwise. But there is always a right order, and this must ultimately be determined by what is ultimate in all things, namely the psychical movement of the creative Self, that which creates all Constitutions. This process we have elsewhere called the Psychosis, and is primarily to be treated in Psychology, which science it generates in the very act of generating itself.

Thus we have before us what may be called the Trinity of Free Government, the first Article of its Faith, profoundly believed-in and stoutly promulgated by the Fathers (not now of the Church but) of the Constitution. This fundamental doctrine of the American political Creed has hardly been assailed in the land of its birth with heresy, being accepted by all quite without question. And this Trinity of the State is not simply trinal, but triune; it has three distinct Powers, represented by Supreme Persons, yet is but one process, which has but one result — the completed Law. Such is the secular Trinity, bearing not only an outward analogy, but also, as we hold, a deep inner kinship to the religious Trinity, whereof this is not the place to speak.

The great object of this triune Process of Government is to bring forth, declare and con-

firm the Law, whose end is to secure Free-Will. To make the Law complete, it must not only be enacted by the Legislature of the Union, and approved by the Executive, but it must also be adjudicated, declared conformable to the organic Law or Constitution by the Judiciary. Then the Law has completed its triune Process through the three Powers of Government. When it passes the Legislature, it is only born, not yet full-grown; it has still to be tested, tested doubly before possessing its final seal of supremacy. The legislative Power does not make the Law with us as it does in England. The British Legislature, being omnipotent, had shown itself tyrannical toward the Colonies; no wonder the Fathers of the Constitution proposed to limit legislative authority as well as that of the Monarch, each of them having shown despotic possibilities. Still this does not mean that these Powers are antagonistic to one another, or even mutually exclusive; on the contrary, they form one Process together, for one supreme end.

And, furthermore, each of these Powers inside its own domain has the other two Powers at work within it, subordinate, indeed, yet active. For instance, the legislative branch in its own sphere of authority has elements both executive and judicial, as we shall see later. Each is a part of the total Process, yet each within itself

has the total Process. Each subordinates the other two, and is subordinated by them in turn; thus each is equal and co-ordinate with the other two in the one supreme Process. Each is a circular link in a chain whose three links form a circle. By such an external illustration we seek to image the inner movement of these Powers, as each is in itself singly, and as it is in the whole. But this movement is ultimately derived from the Self (the Ego) which has formed the State and the Process thereof after its own movement, this being the creative source and prototype of all Institutions.

Accordingly we begin with the legislative Power, which is to enact the Law, but which cannot complete it. Moreover, this law-enacting Process has three stages: the initiating (in one House), the consenting (by the other House) and the approving (by the Executive). Still further we may observe that the initiation of the Law may spring from three sources: from either House (with certain exceptions), and, more remotely, from the suggestion of the Executive. But these matters will be brought out more clearly when we come to consider them in their special Sections and Clauses.

I. THE LEGISLATIVE POWER.

This properly comes first, as it has to utter the People's Will in the form of Law. It is the means of transmuting into a legal command for all

men that which has been fermenting in the popular mind and insists upon utterance. The legislative Power formulates the willing of Free-Will in the Law, which is then to pass to and through the two remaining Powers, executive and judicial, as they also help to make and confirm the Law. In the folk-soul the Law is first conceived, though unrealized, potential, unborn; the legislative Power is to bring the child to the light of day, and to clothe it in its proper dress, when it becomes an actual entity, having its own sphere of life and authority.

Primarily all three Powers were inherent in one Will, that of the Patriarch or absolute Monarch. But slowly they began to differentiate in the interest of freedom, the legislative being apparently the first to break loose from the one supreme Will, in ancient Greece. But the crude Law of the People in their Assembly must be still further subjected to the refining process till a Constitution be reached, which is the Law of Laws; nay, till a Constitution of Constitutions be reached in the United-States, which still more deeply mediates the People with the Law which governs them.

When we glance at Article First of the Constitution, which is the legislative Article, we are surprised at the space it occupies in the brief instrument. It takes up fully one-half of the entire original Constitution, and two-thirds of

the portion devoted to three Powers, the latter constituting by far the larger portion of the instrument.

It follows from the foregoing facts that the legislative element was more fully developed in the mind of the framers and of the country than either the executive or judicial. Indeed, such could not help being the case, as the whole had to be cast into a legal frame-work and employ a legal nomenclature which had come down the ages. The method of making the Law was, therefore, the first in order as well as in importance.

The question next comes up: How shall we reach the constructive movement of this somewhat lengthy Article? What is the arrangement in it, the inner process of its ten Sections? As they stand, they evidently fall into two main portions. The first gives the general Organization of the Legislative Power, embracing the first seven Sections. The second portion takes up the sphere of the legislative Power, telling what it can do and cannot do, wherein enters the exposition of what may be called legislative areas, comprising the last three Sections. That there is a third portion necessary to the complete thought of this Article but not included in it, will be observed by the careful reader. The distinct portions or stages of the Legislative Power we may set forth in advance as follows: —

I. The Organization of the Legislative Power ; this shows (if we may be permitted to use a mechanical analogy) the machine which grinds out the law. (Seven Sections.)

II. The Apportionment of Legislative Areas ; this shows the various spheres and materials of Legislation, that which feeds the legislative machine. These Areas are fixed by the Constitution. (Three Sections.) But new unfixed Areas arise which will have to be fixed and apportioned. So we have

III. The new Apportionment of new Areas always going on ; the Constitution not only defines certain Areas in itself but also defines the Power which is to continue defining them as they rise into existence. Thus we have the Process of Apportionment — the fixing of uncertain Areas and the settling of disputed questions — continually going on in the life of government.

This last part chiefly falls to the Judiciary, and therefore belongs under another Article (the Third). Still we must see its place in the total legislative Process as herein set forth. The apportionment of future incoming domains of the Law between the Single-State and the United-States cannot be specifically settled by the Constitution, but it can and does settle who shall settle such questions.

I. ORGANIZATION OF THE LEGISLATIVE POWER.
A copy of the Constitution lying before us

takes up about eleven pages; the three Powers (the first three Articles), embrace about nine pages or fully four-fifths of the whole; the legislative Article has not quite six pages, or two-thirds of what is devoted to the three Powers; the Organization of this Article (our present subject) has more than three and one-half pages of the six given to the legislative branches. It will thus be seen that more space is devoted to the Organization of the legislative Power than to any other subject in the Constitution. It was certainly deemed the weightiest matter before the Convention, and out of it sprang the chief problems of that body.

It should be noted by the student that towards the end of the Convention (Sept. 8), a Committee on Style was appointed, which was to take the whole mass of plans, amendments and suggestions for the purpose of reducing them to order and correctness of language. Five belonged to this Committee, among whom were Alexander Hamilton, James Madison (the writers of the *Federalist*), and Gouverneur Morris, the latter being deemed the best stylist in the Convention. Hence the evidence of careful arrangement and expression which runs through the instrument, especially in the earlier portions. This order the student must penetrate, as he will thus see the connecting thought better than in any other way.

Hence a study of these divisions, which constitute the organic structure of the Constitution, is of prime importance, since they were in many cases, though probably not in all, intended. For this conscious element of construction has alongside of it, and often underneath it, an unconscious one, which must also be brought to light. So much for the principle of Organization generally, upon which great stress is to be laid.

Now we shall take up the legislative Article and go through it, not with the detail and manner of the legal commentator, but seeking its fundamental, ordering thought. That which we have named the Organization of the legislative Power has the following three constituents: —

I. The House of Representatives.

II. The Senate.

III. The President.

The latter must be added, though he is omitted from the opening Section which declares that all legislative powers shall be vested in the two Houses of Congress. But his place is fully given in the seventh Section (Art. I.) as an integral part of the Law-enacting Power, since he in a way participates in both Houses, as is shown by his veto, to overcome which requires a two-thirds majority of each House.

It should further be noticed that each of these legislative elements has also a sphere of execu-

tive and judicial power, and thus reflects in its own field all three functions of government. Each shares in the general triune principle by being itself triune and mirroring the whole in the part. Each governmental activity, however minute, is to be grasped, not as separate from or opposed to the rest, but as co-operant with and participating in the totality, having the process of the latter in itself as part. Let not the reader turn away from this idea as something mystical or unintelligible, for it is just what truly connects the thought of the Constitution with himself, with his Ego or Self, which has fundamentally the same process.

Along with this genetic psychical fact we may take note of an outer historical correspondence, which likewise has its inner meaning. The three simple forms of government among men have long since been classified as Democracy, Aristocracy, and Monarchy. Now this Organization of the legislative Power in the Constitution of the United States has all three of these governmental forms working together. The House of Representatives is the popular or distinctively democratic branch of the National Legislature; the Senate is aristocratic in form (or at least relatively so) and is sprung of the aristocratic House of Lords in England; the President represents the monarchical principle, he being our legal sovereign — legal in a double sense, not only be-

cause the law imposes him upon the People, but also because the People impose the law upon him, and thus truly legalize him. So we behold our legislative Power descending from a grand ancestry — Demos, Aristos, and Monarchos — the three eponymous heroes of the three kinds of government. Here again we have to remark that same threefold movement, which always rises to the surface when we take a complete view of any portion of our subject.

But it is time to begin with the Constitution, which is now to be seen unfolding itself in accordance with the preceding divisions and the principles underlying them.

ARTICLE I. — SECTION 1.

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The reader will note the emphasis produced by the isolation of this Section, being a short, single sentence standing alone without any added Clauses — which fact makes its form unique in the present Article, if not in the whole Constitution. Also observe that the rest of the Article unfolds directly (for the most part) or indirectly out of this brief statement by an inner genesis.

Nature herself suggests the division made by this Section. In every community there are the young men and the old, though without any

precise dividing line. To each of these classes, primarily given by Nature, belongs a corresponding spiritual attribute. The one leans more to thought, the other to action, representing Intellect and Will respectively. The one, therefore, shows steadfastness, caution, foresight; the other shows boldness, willingness to take the initiative, desire for change; here are the two original political parties of mankind—the conservative and the progressive. In deliberating upon the affairs of the community there will be present these two spirits expressing themselves in two opinions, two parties, and finally in two assemblies, that of the old men (wisdom), that of the whole people (power).

The double chamber or bi-cameral system of Legislature is an inheritance of the ages. We may find a germ of it in the Village Community or even in the House Community, in which every man has a voice in the conduct of affairs, and the little assembly of old men and young meets and deliberates every day, usually under a tree, along with their head-man. A more advanced stage we may see among the Greeks of Homer's time, who had two assemblies, that of the elders and princes (*Boulē*) and that of the people (*Ecclesia*). Rome had its Senate (*Seniores*) from which our Senate takes its name, and also its popular assembly. Something of the same kind was found among the Germans, as described

by Tacitus. Early England had various forms or this same double Legislature. To-day it exists in the mountain cantons of Switzerland and in some of the more remote or less advanced portions of Europe.

In the course of time the membership of the Upper House was mainly settled by birth, while the Lower House, or that of the People, became representative. It is said that Simon De Montford, in 1265, summoned the first Parliament of England in which representation was distinctly established, two members being assigned to each borough and city.

In the Constitution of the United States membership of the Upper House is no longer determined by birth, but has become representative of the Single-State, while the Lower House has become representative of the People according to population. Thus two kinds of representation are indicated by the two Houses. In England the Upper House can hardly be called representative, while the Lower House in recent years has been made more and more representative of the People according to population (which is the American method), and less according to locality.

Thus we may note the general movement of this double legislative principle. First, it was present among early peoples in its simplest, most immediate form, in which the individuals of the

Community took part, without representation of either element; but in the final or American shape both elements are represented. Intermediate lies England with Europe generally, in which we find one of the two Houses representative and the other not.

Such is the general evolution of the bi-cameral system, to which exceptions exist in both directions. Modern Greece has but one chamber, so also some other small countries, for example in Central America. On the other hand the Legislature of Finland consists of the four estates of that people. Several of the colonial Legislatures were unicameral before the Revolution. After the adoption of the Constitution, two States, Georgia and Pennsylvania, retained the one chamber, but soon gave it up and joined in the bi-cameral uniformity which now exists in all the Single-States. The same general fact is observable in the recent legislative development of Europe. Thus the bi-cameral system seems to be moving along with modern progress, and to have its roots far down in the sources of our democratic era.

Still it has met with strong opponents, who have made its twofoldness, seemingly so hostile to unity of government, the butt of some cutting epigrams. Level-headed Benjamin Franklin thought that two chambers to one government would be like a wagon with a horse

before and a horse behind pulling in opposite directions. The simile is said to have so tickled the Pennsylvania farmers that they adopted the single legislative chamber into their State Constitution. Strange that they did not think of a team needful for pulling that heavy wagon of theirs called a State. Such a thought at last did dawn on them, and they too passed over into the bi-cameral choir of States.

Well known is the epigram of Abbé Siéyès, the great Constitution-Maker of the French Revolution: "If a second chamber disagrees with the first it is baneful; if it agrees, it is superfluous." This was evidently suggested by the statement of Caliph Omar in regard to the library at Alexandria: If it agrees with the Koran, it is unnecessary; if it disagrees, it is injurious; so burn it up. John Stuart Mill and the Radicals generally incline to a one-chambered Legislature for a free government. But the historic evolution of the Law-making power speaks emphatically otherwise, as we have seen. In the development of our own national Legislature, we passed from the one chamber of the Confederation to the two chambers of the Constitution — a great step in advance.

Still it is well to consider this legislative dualism which the enemy points out, and to see how it is met. The truth is that there is a third co-ordinate power in legislation, that of the

President or Executive (See Art. I, Sec. 7). So we have in the United-States three organic elements in the legislative Power: the one Will (President), the few (Senate), and the many (House), whose united process is to bring forth the Law. The Union as one and indivisible must be represented also in legislation by the one Will chosen for this purpose; so the dualism of Congress finds its unity in the President, of course within certain designated limits, of which more will be said later.

The word *granted* in the above Clause is important. *The Powers herein granted* by the People did not previously exist. Thus the whole Constitution is a grant of Powers before non-existent, while the State Constitutions did exist, and so were limited by these new grants to the National Constitution. The underlying conception must be a limitation of the pre-existent Single-State.

The legislative, or more strictly the Law-enacting Process must be threefold; to the separative idea of the bi-cameral system must be joined the unifying third principle, which is itself One Will. Thus the Law is enacted, sent forth, and even applied; but it is not yet complete, till it has been judicially sanctioned by the highest tribunal of Justice.

As it is the plan of this essay specially to study the Processes of and in the Constitution,

we shall briefly designate these again, as they show themselves in the present connection. That which we called the Law-enacting Process (embracing the two Houses of Congress and the President) has within it, first of all, the Process of Congress taken by itself (six Sections), which is threefold, or if we may introduce here the psychical term, is the Congressional Psychosis (conception of the two Houses, separateness of the two Houses, united movement of the two Houses). But, in addition to this Process together, each House has within itself its own inner Process which is also threefold and reflects the threefold Process of government. All these points we shall endeavor to bring out in the discussion of the following Sections and Clauses.

ARTICLE I. — SECTION 2.

Cl. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Cl. 2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Cl. 3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all

other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

Cl. 4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Cl. 5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

The present Section is devoted to the House of Representatives, the popular branch of the bicameral system mentioned in the preceding Section. Its name puts stress upon the fact of representation, as if it in a peculiar sense represented the People. The Senate is also a representative body, and the President is declared to be the representative of the People. In fact the whole government of the United-States is a representative government. There is no ruler by right of birth like a king, there are no privileged legislators who are such by virtue of their class like the House of Lords, and the Upper Chamber generally.

Thus representation permeates the whole polit-

ical fabric of the United-States. In Europe it was originally confined to the Lower House, as in the House of Commons. Hence it has come that the House of Commons has appropriated the other powers of government, and thereby has made England fundamentally representative.

In the ancient democracies the people were present in person (at least such was the theory), passing laws and rendering judgment. In the modern world the People are to be *mediated* in their governmental capacity through representatives. They elect in one way or another those who are to do this work. The immediate will of the people is not allowed to govern, they do not allow it to govern themselves. Impulse, passion, unripe opinion, momentary caprice are to be eliminated as far as possible by the many reducing themselves to one.

It will be seen that representation is a deepening of the institutional spirit in man. The People refuse to administer directly their own Institution as something too special for them to deal with, but elect those whose particular duty is to perform such a function. Moreover through representation a large country and a numerous population can have free government. Representation, therefore, means mediation of the People with their Institution, and representatives may be called mediators. The People of themselves seek to get rid of caprice through this new In-

stitution in order that all may be free. The mediation of man with the divine world (which is also institutional) is the great fact of Christianity. Secular representation touches profoundly the same fact, as it arose and has flourished only in Christendom.

The House of Representatives, therefore, contains not the only representatives of the People. In this respect the name of it is not altogether appropriate. Still it is most directly representative of the People, and is supposed to be closest to them. In *Clause First* it is required to be chosen every second year; thus every member has to be elected biennially, there is no holding over of a part of the House as is the case with the Senate. Fresh from the People each member and the whole House must come once in two years. So we may call them representatives of the People in the first and most immediate sense.

But just this is a reason why the House is not sufficient unto itself; it is too immediate, too popular, partakes too much of the floating, evanescent element of the People. Hence it also must be *mediated*, its proposals cannot be allowed to govern directly, without being assented to and confirmed by the two other elements of the national Legislature, the Senate and the President. Then its bill can become a Law, but even this Law may have to pass still another ordeal (the Judiciary) before it can return to the People and

govern them. In all this we see a manifold and complicated mediation of the People as immediate. Not their transitory ebullition must be permitted to govern them, but their eternal element; and it must be recollected that this they have done to themselves for themselves. The People through these institutional contrivances seek to sift out and reject their momentary passion, caprice, prejudice, till the pure principle of the Law remains in its universal and permanent form, and by it they are at last to be governed. Thus they seek to mediate their immediate selves by manifold grades of representation.

It is manifest that in making such a Constitution the People must have come to know itself, must have seen distinctly its own double nature, as immediate and as mediated. It has become conscious of the supreme popular weakness and takes the means to transcend the limitation. Strange, but the American People will have nothing to do with itself as immediate, it has a kind of horror of itself as a mere mass, indiscriminate, unmediated; it knows the danger and folly of itself as a multitude, and shuns itself in that form. This signifies that it is permeated by the institutional spirit; it must act not directly and passionately, but through Institutions. To be sure, there are localities in the United States in which this institutional spirit is very backward; and sometimes on great provocation, it is disregarded in more advanced communities.

Representation is, then, the means of mediating the People with Institutions. The many individuals of a certain circumscribed territory select the one individual as representative, and he does not represent them in his individual capacity alone, but through the Institution, which has to be worked by him, and which in the present case is the House of Representatives.

It is for the above reason that Radicals in Europe and elsewhere do not like the American Government. They think that it has too much mediation altogether, that the People as immediate ought to govern, as it were from day to day, in their popular assemblies. Of course this does away with the principle of representation, which has been a great evolution of the ages, in order that man might be institutionally free. The Radical (for so he calls himself) has little or no institutional feeling, he has not made or scorns the distinction between the immediate and the mediated in the character of the People, whose direct Will he regards as the only freedom. Over and over again it has been proved in history that such a freedom ends in tyranny, if it is not already a tyranny.

In *Clause Second* are given the qualifications for Representative as required by the Constitution; there are three, but the People who elect him must look after his other qualifications (ability, honesty, patriotism). The Constitu-

tion speaks only of his age, his citizenship of the United States, and his State inhabitancy. Note here that he must be a citizen of the total Union, though an inhabitant of the Single-State, through which he is to be sent to the National Congress. The People must make the intermediate Single-State in order to reach the United-States.

Already the distinction between the electors (voters) and the elected has asserted itself, or that between the represented and the representatives. Each element must have its qualifications. Those of the representative are few and simple, since the most important must be left to the judgment of the electors. Still it should be observed that no property qualification is demanded of the representative, no requirement as to rank or place of birth. The worth of the Person has the stress, whatever be his blood or his country. Classism and Nativism are quite disregarded at this point. It should be added that two of the most eminent and creative members of the Constitutional Convention were foreign-born, Hamilton and Wilson, both of Scotch descent.

The next question to be settled is the qualifications of the electors. Already it was said in *Clause First* that they should be the same as "the qualifications requisite for the electors of the most numerous branch of the State legisla-

ture.” This would seem to be leaving the settlement of the matter to each Single-State. But here another problem rises: How many representatives is each Single-State allowed to send? Are they to be assigned to it according to the population? If all persons are to be counted, is the slave a person? The spirit of the Constitution is to give validity to the worth of the Person and make him a voter. But are there no limitations to this doctrine? Are other races to be allowed the elective franchise?

In *Clause Third* we are made aware of the presence of three races in this country—the Caucasian, the African, and the Indian—the white, black, and red man. Nature distinguishes them not only in feature, but also in color; civilization has distinguished them even more deeply in character. The framers of the Constitution had, therefore, the question before themselves: Shall our recognition of the worth of Person stop at the limit of race? The problem is still existent, and promises to play a more important part in the future than in the past, not only in our own country, but in other parts of the world.

First we may take a little note of the red man, who was the occupant of the country when the white man arrived. “Indians not taxed” are excluded from the enumeration of the voting population. They still lived after their primitive

manner in the Village Community, which held its domain in common, and in which individual ownership of land was unknown. The woman did the labor, the man was warrior and hunter. In such a community there could be no tax, the Indian did not really understand what a tax was, there was nothing corresponding to it in his Institution. The whole Revolutionary War was a huge mystery to him, for that turned upon the question of taxation. Ultimately the voter had to tax himself; how could the Indian do that? Evidently the whole institutional basis for his being a voter was wanting.

Already at the time of the making of the Constitution the fate of the red man was substantially settled. He was brave, he could endure hunger, suffering, the privations of war perhaps better than the white man. But his little simple Institution could not stand a moment before that of the organizing Anglo-Saxon. For a century and half the two had battled on the ever-receding frontier, with one general result. The Indian, getting possession of the weapons of his enemy, could and often did slay individuals; but he and his petty world were to be swallowed soon by his enemy's Institution.

There was also the conviction at that time that the Indian could not be assimilated, he could not jump from his social condition at once into that of the white man. He claimed the land, but

he would have to give it up; for what use was he making of it? The Anglo-Saxon has been bred to a greater love of land, or rather hunger for land than any other people. His island home is limited on all sides by "the barren sea;" for generation upon generation he has felt cramped for ground to cultivate. The result is he has become the greatest "land-grabber" the world has ever seen. Little England is, however, now being imitated by little Europe, especially the western part thereof; which also feels itself circumscribed in territory.

When the Englishman stepped upon the Continent of America, he had a vast opportunity for indulging in this propensity to get land. The Indian did not cultivate it, did not individually possess it; what a waste of good soil! So the Anglo-Saxon could here, for a time at least, appease his land-hunger which had gnawed his ancestors for hundreds of years. And the Indian could not become a citizen, having no Institution preparing him for such duties. It was not because he was a heathen; many of the Fathers of the Revolution, Tom Paine for instance, and even Tom Jefferson, would have no scruples against him on that score. The Yankee Puritan often sought to convert him, and often to kill him, but always got his land.

The English race by its training has taken upon itself to go round the globe and ask every

backward people. What are you doing with that piece of earth over which you have been placed as steward? The time has come when there must be a reckoning; civilization is calling for some responsibility from the possessor of Nature's bounty. The greater land question, that of the globe itself, is not yet settled. It looks as if in this matter, too, America has set the example. So much history as well as food for thought lies in that little expression "Indians not taxed;" not having risen to the power of self-taxation, they have not risen to the power of self-government in its civilized form. The Anglo-Saxon overseer of civilization on its institutional side—self-appointed of course, as he must be—has then propounded this question to the Indian: "What are you doing with the piece of earth committed to your care which has now become so valuable to little England, yea to little Europe? If you do not raise bread from it, I must"—and therewith begins the struggle with the Indians and all other peoples not taxed and not taxable. That this struggle is in full vigor at present all over the world is one of the significant facts of the time.

But in this same *Clause Third* appears another race, the black man, very different in character from the Indian. He can be enslaved, the Indian cannot, but dies rather than serve. The Indian perishes in the presence of another civil-

ization, but the black man thrives under it, living on it like a parasite. Thus the Indian question for Americans is a vanishing one, but the Negro question persists, becoming more and more a burning problem, and has still a hot future before it. That cringing, subservient, good-natured darkey, without any fault of his own, has been the greatest source of the white man's woes on this continent. Why should this be? Certainly it is one of the strangest things in the World's History, with some providential cast in it, which sets us all to thinking. The political starting-point of these woes lies in the Clause before us.

Here occur the fatal words: "Three-fifths of *all other* PERSONS." The Convention would not suffer the word *slave* to be written in their instrument; the very sound of it seemed to produce a shiver of dissonance that must have been felt by even the South Carolina members, the strong supporters of slavery and of the slave-trade. Then every man who voted for the Constitution would have had a thrill of contradiction as he read the word. Here, then, are "other Persons" without rights, without freedom in a free country, Persons who are no Persons.

Such was the chief strand of destiny woven into the Constitution at its birth. Though the word *slave* with its ominous sound was suppressed, the thing had to be acknowledged for the sake of Union. At least this was the opinion of the

framers on the ground, most of them enemies of slavery. This liberty had to be partial in order that Union might first make itself complete. Wait; when Union has fairly completed itself it will turn back to this instrument and to this very Clause in order to make liberty complete, and free itself of this discordant, soul-gnawing contradiction. (See the later Amendments.)

A further effect of the three-fifths rule was to destroy the equality between the white voters in the different parts of the Union and also in the different parts of the same State. Pennsylvania in 1860 had 2,893,266 whites; the extreme Southern belt of seven States from North-Carolina to Louisiana, had 2,829,785 whites. The former had 24 representatives, the latter 39 representatives and still were not satisfied with their share of power, and seceded from the Union. In the Single-States of the South the same inequality existed between mountain districts with few slaves and the counties containing many slaves. The body of slaveholders ruled their own State, and combining together in the South, ruled the whole country, making it really an aristocracy, the number of slaveholders being less than 200,000 at the beginning of the war. Such was the grand perversion of the form of government introduced by this *Clause Third*. Repeatedly in the convention the Virginians opposed slavery as degrading to white labor and driving

it out of their State. It took refuge in the great North-West, then opening, and will in time give a good account of itself.

This apportionment of representative population is really the first struggle between the Free-Labor States and the Slave-Labor States, the latter being the aristocratic States, based on African slavery, or on racial distinction. The further development of this struggle cannot be here given. But it is plain that the framers of the Constitution drew the line of recognizing the Person at the limit of race. They did away with Classism, or distinctions of rank among their own people. They reduced almost to nothing Nativism, which discriminates against the birth-place of people of their own race. But when it came to admitting to equal political privileges persons of a different race, who were in their midst — the red man and the black man — they were inclined to hesitate, even if it be shown that free negroes voted in some States, and that the taxed Indian sometimes may have exercised the right of suffrage. Thus the most general distinction which mere Nature has placed upon mankind the Constitution recognizes as a badge of exclusion from participation in free government. That is, it acknowledged Naturism, as we may call it here, after doing away with other inherited limitations of birth, as Classism and Nativism. Recollect, we are now speaking of the old Constitution,

as it came from the hands of the Fathers; what the new Constitution (the later Amendments) has done in this line belongs to a future chapter. Political privileges as well as the denial of them have usually been based upon the three nativities of class, place, and race; that is, one must be born in a certain class (or rank), in a certain place (or country), or of a certain race (or color). Undoubtedly the movement of Institutions has been towards wiping out all these distinctions of birth as a ground for political privileges, though there is still no little work ahead.

One other distinction of Nature dividing all humanity in another direction, across classes, places, and races, may be here mentioned: that of sex. Apparently the framers of the Constitution did not dream of female suffrage. Yet it has been shown that just in this period women did sometimes vote. Truly a germinal epoch, in which all the future seems to be sprouting! For the white woman (or at least a few of them) has stepped forward and wants to be "enumerated" in the Constitution of her country, and not to be left out in the company of the Indians, Negroes, and Chinamen, other races than her own and than that of her father, brother and son. At the phenomenon the white voter looks in a state of infinite bedazzlement, and can only query: What next?

When vacancies occur we find, by *Clause Fourth*, that they are referred back to the Single-State, from which the Representatives come. While the new House is organizing itself the clerk of the previous House calls the roll and presides till the election of Speaker. By *Clause Fifth* the House of Representatives is empowered to "choose its Speaker and other officers," that is to establish its own little executive government, which has also a President (here called the Speaker). Thus it elects its own ruler and has its own laws of procedure which it makes and executes. It performs its own law-making act before making the law for others. It is also judge of itself and its own proceedings, and has in the sergeant-at-arms and his help a miniature army for carrying out its behests. Then it has the sole power of impeaching officers of the general government; it is the prosecutor when Congress becomes a Court, and transforms itself into the Supreme Judiciary of the Union, to which even the Chief Justice would have to submit for trial on due accusation. Thus the House of Representatives has a judicial function also, not only in connection with itself and its members, but also in connection with the Senate, both forming together what may be called the Congressional Judiciary, of which Court the House is an organic part as the sole prosecutor. From this it is evident that

the judgment of Congress can make itself ultimate in regard to the constitutionality of any act of the Executive or of the Supreme Court.

Thus the House in organizing itself becomes a kind of epitome of the whole government, with powers executive and judicial as well as self-legislative while legislating for others. It is within its sphere self-governing, and so we may also call it an epitome of the People as a whole, this epitome or part of the totality showing in its own inner movement the process of the totality, to which it belongs, and of which it is a constituent principle just by virtue of this fundamental process.

Doubtless the American House of Representatives springs from the English House of Commons, but the latter is less self-governing than the former (though it has far more power), since the Speaker after election by the House has to have the approval of the Crown. This, however, is hardly more than a formality, as the administration goes back to the House of Commons for its power, and indeed for its origin. Thus the Crown does hardly more now than approve its own selection.

Problems are rising about the size of the House of Representatives, and also about the representative population for each district. The first House after the first census (1790) had 105 members or one representative to every 33,000

population which proportion lasted ten years (1793-1803). A century later the House has 356 members, one to 173,901 population (1893-1903). Is this representation adequate in quantity? Is it adequate in kind? The population of the land is no longer so homogeneous as it was, having many new and diversified interests; should this heterogeneousness be also represented? Into these questions and others of the sort we cannot here enter.

The Constitution, having dealt with the House of Representatives in its apartness, next takes up the Senate in the same fashion.

ARTICLE I. — SECTION 3.

Cl. 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Cl. 2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Cl. 3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Cl. 4. The Vice-president of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

Cl. 5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-president, or when he shall exercise the office of President of the United States.

Cl. 6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Cl. 7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

This Third Section of the First Article deals exclusively with the second chamber of the bicameral system—the Senate, which occupies a unique position in the history of Legislation. It is still representative, but in quite a different way from the House of Representatives, which has in a manner usurped the name. The Senate represents distinctively the Single-State in the legislative Process, being elected not by the People directly, but by the State legislature, which is elected by the People. Thus the Senate requires a double mediation, being sifted twice, as it were; it is a smaller, more exclusive, more aristocratic body, for aristocracy is a part of the process of every government, though it should

never be all of it and rule. The Senate is also made, through its construction, a permanent body, and has always a majority of old members, so that its name is still applicable, being an assembly of the elder ones (*seniores*) in experience if not always in years. By contrast, the House may change wholly every two years if the People say so; thus it represents the People immediately, and first voices the coming popular judgment on some public question, or, it may be, a temporary whiff of popular caprice or passion. Just for this reason the House should not of itself make the Law which is to be permanent; it must have the co-operation of the permanent element of the Legislature, which is the Senate and which the People cannot change every two years, two-thirds of its members by the Constitution holding over. In principle, then, the House is always new, but the Senate is always old, at every term of Congress, two years being the test of age in this case. Still the Senate cannot exclude change, it too must yield finally to the persistent conviction of the People, which has, however, to show itself persistent. That is, the Senate is likewise representative of the People, though not directly, but through the Single-State.

But the supreme fact about the Senate is that every Single-State has two Senators and only two, each of whom votes independently in the body.

Here is the most striking assertion of the equality of the Single-States, and here is its mightiest bulwark. However small or large, however rich or poor, however populous or the contrary, the Single-States are equal in the Senate, whose assent is necessary to the enacting of any Law governing the whole Union. This is certainly one of the most important and far-reaching provisions in the Constitution, and has had an influence on the future of the country which the founders did not and could not foresee. For the Constitution in its deepest movement has turned out to be a State-producing instrument, unexampled in all former history. The new Single-State, coming into the Union is at once received as equal in Statehood by the reception of its two Senators into the Senate, and assists in making laws not simply for itself but for the whole country. Thus it becomes fully a State along with the other States in its own right under the Constitution. Without this equality in the Senate it may be truthfully declared that the Union would not have been State-producing, but perchance only province-producing, and would have failed of its supreme mission in the world by dropping back merely into another form of the Nation-State of Europe.

Not without a fierce struggle was this act accomplished in the Convention and elsewhere. Most of the old thirteen States wished to domi-

nate the new incoming territory of the West, asserting claims over it somewhat as Great Britain did over the Colonies. Not very consistent was such an attitude in States that had revolted against similar conduct in the mother-country. But the spirit of the times succeeded by one contingency and another in checkmating this backward movement, and whipping forward the recalcitrant States to their true destiny.

In *Clause First* this equality of the Single-State is substantially declared and fully organized into the legislative Process of the total United-States. Every item here mentioned had a long and complex history in the Convention and before it. What qualifications for Senators? How and by whom are they to be chosen? How many? For how long a time? This chaotic swirl of historic contingencies we shall have to pass over, noting one main matter.

The struggle for State equality was naturally carried on by the small States against the large States, the latter insisting upon representation by numbers in the Senate as well as in the House. Undoubtedly this was a contest between two selfish interests; but that is the way history usually works. Both parties are equally self-seeking, perchance; yet in the one lurked the future progress of the country, indeed of the world, while in the other lay retrogression, reversion to State domination, if not to State tyranny, in

fact a going back to what the American People had given seven years of war to get rid of. The final vote in the Constitutional Convention stood as follows: Delaware, Connecticut, New Jersey, Maryland, North Carolina, all of them small and the smallest States (Rhode Island not being present in the Convention) gave their five votes for the affirmative; Virginia and Pennsylvania, South Carolina and Georgia gave their four votes for the negative — three other States not being counted for one reason or other. Thus only nine States voted at all, the five smallest States carried the measure (twelve States being represented in the Convention); less than one-third of the population of the country, according to Mr. Towle, through their delegates had succeeded in establishing the principle of equality of the Single-States in the Senate, and consequently in the whole governmental process.

Thus the powerful State is brought to recognize the weak State as one with itself in the right of Statehood, and this recognition is not a mere sentimental affair, at the choice of the great State, but is made objective and institutional in the organic law of the land. Now the Union can be generative of equal States and march forward to its grand calling in the World's History. But we almost shiver when we think how near this destiny came to being lost, or at least to being long deferred.

In *Clause Second* the construction of the Senate as a permanent body is set forth. This is brought about by the rotatory plan, which every two years throws out one-third of old and receives one-third of new members. One revolution is made with one term of Congress. The Senate has this rotation or process within itself; the House does not have it, but changes wholly with each term, having its process outside of itself with the People and not within itself like the Senate. From this it is manifest that the Senate is relatively self-centered, hence more stable, revolving on its own axis, while moving harmoniously in the national system.

From time immemorial the Senate or the Upper Chamber, or the House of Lords, had been based on birth. By *Clause Third* we see that the qualification of blood is left out. At the same time the stability and permanence of an inherited legislature are sought to be obtained by other devices. The United-States acknowledged no title of nobility; hence the Convention had to construct the Upper House anew, since they had no European model, though a suggestion might be found in some of the Colonies. Then, too, we must note that the foreign-born citizen was not excluded from the Senate, though he had to serve a fair apprenticeship. Again we see that both Classism and Nativism were here thrown out of the Constitution.

The Vice-President as President of the Senate and next in rank and succession to the President of the United States, appears in *Clause Fourth*, thereby interlinking, as it were, the Senate with the Executive, and in other respects the Senate has a decided executive element, having an executive session as well as a legislative one. This point is important for our conception, since not only the total Legislature but each branch of it stands not isolated in its action, but participates in the whole threefold process of government. Similar is the procedure in the House of Lords, over which the Lord Chancellor presides, or some person appointed by the Crown, or by the executive Power, which thus connects itself with the Upper House of Parliament. In case the Government appoints no presiding officer, the Lords elect one of their own, as does the Senate also, as we see by *Clause Fifth*. The President *pro tempore* of the Senate may become by law President of the United States in case the elected President and Vice-President die or are disqualified.

A new function of the Senate is introduced by *Clause Sixth* and is continued in *Clause Seventh*, the judicial. The Senate has the sole power to try impeachments, which are to be initiated by the House of Representatives. Thus the two legislative branches (as already noted) are turned into a court, one branch being prosecutor and

the other being judge. The procedure is copied from England, whose House of Commons impeaches and whose House of Lords tries the case.

Thus the national legislative function seems to culminate, not in passing laws but in being judge over the other two departments of government. Over the Supreme Judge is a Judge more supreme, and over the Supreme Executive is a power of still higher authority. Only once was a President, Andrew Johnson, arraigned before this Congressional Court, and he was acquitted. No Chief Justice has ever been cited into its presence, though Judge Taney had his arraignment for his decision in the Dred Scott case before a still higher Tribunal than this Court of Congress.

The logic of this procedure is that the legislative Power, having enacted the Law, must see to it that the Executive executes the Law, and the Judiciary adjudicates the Law, in other words that the Law's Process is complete. If this is not done, the Law is of no avail, and the Legislature has no ground of existence. The total Process of the Law requires the co-working of three Powers. The oversight of all three belongs finally to the Power which brought the Law into being, which must look after the other two Powers and itself too. The first impeachment was that of a Senator, Blount of Tennessee

in 1798. Then each House has the power of expelling members.

Thus Congress, in these two Sections (Second and Third) of Article First, rounds itself out with a supreme judicial function, being the judge of the judges of the Law and also of its Executive. The Senate as legislative shows and must show the total Law-producing Process by possessing both executive and judicial elements. The same is true of the House. And in this Third Section we find the following order: (1) the legislative element of the Senate organized (first three Clauses); then (2) its executive relations as regards the Vice-President (Fourth and Fifth Clauses); and (3) its judicial function in impeachments (last two Clauses). Hence the very structure of the present (senatorial) Section suggests the three Powers of Government working in the structure of the Senate. Every constituent part of the Whole has in it the process of the Whole making it a constituent part thereof. The Senate is a part of the whole Government, whose three functions working within it (the Senate) make it a part and partaker of itself, the Government; otherwise the Senate would not be a part of the Government, but might be of something else.

The Senate is not so completely a self-governing body as the House, since its presiding officer primarily comes to it from without. On

the other hand it has more decided judicial and also executive elements than the House. Still it, too, in its way, is an epitome of the whole Government, having within itself the entire process thereof; turning on its axis it makes its own cycle, which, however, is but a part of the total governmental cycle.

Popular Institutions must now be so constructed that the People are compelled to think before acting finally. This is at least the case with the self-knowing People as distinguished from the impulsive multitude; they cannot be allowed, or rather allow themselves, to do in a hurry what they will soon repent of, as often happened in the old Athenian democracy. They must give themselves time to deliberate, to truly find themselves out, especially by the help of their Institutions. So the Senate cannot be changed in its membership by one election, two-thirds of the old members remain; hence the People have to think twice before they can change the Senate; they have to know their own mind and know it as permanent, before it can determine the permanent element of legislation. Herein we note again that the American People as unit must be the self-conscious one, must know itself in its own limitations and excellences, must guard against its own caprice and passion and yet insist upon its own settled conviction, yea, it must not only know itself,

but must come more and more to know the Self as such in order to carry out and perfect its government.

The representation of Statehood in its equality by the Senate has been a great training for the whole country. The large State is made to recognize the State-Will as such, in its own right, without regard to wealth, population, area, or any other external quality. The State as an idea is thus brought out and enforced by the Constitution. A great ethical development we hold such a step to be; as every individual man is to be recognized by every other man in his manhood, however weak, poor, deformed he may be, so every State is to be recognized by every other State in its Statehood, though the one be a pigmy and the other a giant. Such is the rise of a true consciousness of the worth of the State, on a parallel with the rise of the true consciousness of the worth of the man. The latter has, indeed, become institutional through the former, and is no longer the merely subjective emotion of a sympathetic humanitarianism. So the State has begun to recognize the State as one with itself, or rather as its very Self; only a beginning it is now, even in America, but it is destined to make the circuit of the world. No State has ever before existed which would not lord it over a weaker State, though of the same blood and same degree of civilization. But

through the Constitution of the United States the Single-State has been trained to recognize the Single-State, and the same training with its full institutional significance has passed over into the spirit of the People, and must with time pass into all nations.

From these reflections it is apparent that the Senate performs a very unique and far-reaching function in the Constitution of the American Union. There is no doubt, however, that it has developed certain defects. The election through the State legislature has specially shown itself as an imperfect method. Many are in favor of having the People of the State choose their Senators. Evil has been prophesied from the fact that a combination of the Senators of the small States might be made which would thwart the senatorial representatives of nine-tenths of the population of the Union. As a fact, however, the small States have been pretty evenly divided on the great questions which have agitated the country, for instance on the slavery question. Small and large States belonged equally to the North and South.

Having considered the two Houses as to their separate organization in the preceding two Sections, the following three Sections treat of matters common to both Houses, which now constitute the unity called Congress. Here the two are harnessed together by a number of devices

into a team for pulling the load of legislation most adequately. Thus the present portion of the Article is devoted to the co-ordination and co-working of the double legislative principle (bicameral). In order to make this unification complete, a third element will be added, the executive, whereof we shall speak in its place.

ARTICLE I. — SECTION 4.

Cl. 1. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time by law, make or alter such regulations, except as to the places of choosing Senators.

Cl. 2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

We now see the sweep of this part of Article First, the legislative Article. It starts (Section First) with the conception of the legislative Power, which separates within itself into the two Houses (1). Then these Houses are each treated in their separation in Sections Second and Third (2). Finally we have their return to unity in a mutual process with each other (3), which is unfolded specially in the three Sections already designated. The latter is doubtless the most important stage, is in fact Congress realized, for each House by itself is like the half of the human body, unable to perform the vital process of the total organism. Or, in a deeper way, we should seize the whole as the inner psy-

chical movement of the organization of the two Houses, which starts with the implicit idea of legislative Power and then separates into its explicit, visible, twofold manifestation (the two Houses), which, however, returns to unity (in Congress) and keeps up the continual process of legislation.

Thus it comes that our thought has to grasp two opposite and seemingly contradictory terms and apply them to Congress; each House is a separate and self-determined unit in itself as to organization, and yet the two are inseparable and have a common end, that of formulating the Law, which is not possible, except by the co-operation of both. Yet even this is not sufficient to complete the Law.

In *Clause First* of this (Fourth) Section we find Congress looking to the source of itself in the Single-State, whose legislature can prescribe "the times, places and manner of holding elections for Senators and Representatives." Still Congress asserts its supremacy in this matter by reserving the right "to make or alter such regulations" of the Single-State. The latter might refuse to do its duty, and thus obstruct the return current from itself back to its head in the Union. The Single-State has to do its part in the government of the Whole, and the Whole has to look after it on the ground of self-preservation. So far the Union can coerce the Single-

State, compelling it to do its part in the legislative process here indicated, which cannot be allowed to be dependent on a lagging or recalcitrant member. Hamilton strongly supported this Clause, Patrick Henry bitterly opposed it as "destroying the end of suffrage." But hardly anybody will now deny the wisdom and the moderation of this Clause.

That there is to be an annual assembling of Congress is provided for in the *Clause Second*. This presupposes a continual need for Law, and so there must be a never-ceasing activity of the Law-enacting Power. Congress, with its double set of representatives coming from the States and from the People to the Capital of the Union, keeps up a perpetual flow of legislative ideas and impressions from the remotest periphery of the country to its center, which is to transform these as yet subjective ideas and impressions into the objective Law for all, or is at least to sift them, keeping the good and rejecting the bad, if possible.

This yearly gathering of Congress means that the Nation is alive, is a process which goes its round annually with the Sun, the center of another system, not of States but of Planets; yet each State and each Planet we may see turning on its own axis and having its own special process within itself, while being also a part of the process of the

Whole. Each system has its Law, and indeed each in its way is perpetually enacting its own Law, making it real in the world. Still there is a great difference between the two systems and their Laws. The object of the State is to secure the free activity of the inner world, of the Self, through the Law, which is for a self-conscious being and is ultimately self-made. But the Law of the Planets determines them externally and is blindly followed, not being self-made, but imposed upon them as unconscious and inanimate things. Such is the distinction between Nation and Nature, though both have much in common, even a common root in language and in thought.

Thus with the return of the season in the planetary world Congress returns to its legislative task, keeping up its part in the eternal process of the State whose function is to will Free-Will through the Law. The present Section shows us how the National Legislature is to secure itself against the possible opposition, or apathy, or folly of the Single-State, and make its own life-giving movement continuous.

Annual sessions of Congress are required by the Constitution; "at least once in every year" it says. But there may be and have often been more, and emergency may protract a session of Congress. Thus the continuity of Congress is not only asserted within given limits, but is made flexible, and adjusts itself to the needs of the time.

ARTICLE I. — SECTION 5.

Cl. 1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Cl. 2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Cl. 3. Each House shall keep a journal of its proceedings, and from time to time, publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Cl. 4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

In the last Section (Fourth) we noticed a movement from the periphery to the center of the Union in the legislative Power. In the present Section (Fifth) there is a movement the other way, from the center back to the periphery, from Congress back to the People, through publication of proceedings and discussions.

Also each House is self-organizing and self-governing within its own sphere, independent of any other department of government. Yet the two Houses are inseparable, one cannot adjourn without the other. Still further, both are responsible to the People, to whom they must be perpetually giving an account of themselves.

If, in the previous Section, the continuity of Congress was strongly asserted and provided for, that continuity is unfolded in the present Section and organized within the two Houses, both as separate and as one entirety.

In *Clause First* each House is considered a self-governing unit within its sphere, and is judge of what pertains to itself. Thus each is a little State from this point of view, exercising all the functions of government, executive and judicial as well as legislative, for it makes its own laws — those which govern it in its proceedings. The latter power is stated in *Clause Second*. Again we should note how each special part or power of the State reflects the whole process of the State, in order to be a vital, concrete part thereof. Not only the legislative branch, but each House of it manifests the process of the Whole and thereby is just its special self.

The quorum is a majority, but a smaller number can compel a quorum, though not a vote. Fifteen can compel attendance. This is to make members do their duty, when they shirk. The Speaker alone properly has this power. The ground of their compulsion is that they are sent to make laws, and paid for it, hence the Speaker may voice the People and the Constitution against the shirking members.

The self-governing principle of Congress is still further developed in *Clause Second* in

which each legislative House makes completely its own laws for its own self-government, that it may adequately assist in making laws for the self-government of the People. The logic is that it must first be able to govern itself through its own laws, before it can make laws by which all are to govern themselves. Hence it has also its penal code, seen in its power of disciplining and even expelling a member whose conduct is negative to the Law of the House.

In *Clause Third* we pass from the foregoing idea of the self-government of each House to a different fact, namely that each is responsible to the People and must give publicity to its proceedings (with the exception designated), and also publish its work from time to time, really every day. Open sessions are the means of publicity, printed reports are the means of publication, which is for those who are distant.

The People are to know what their representatives are doing, the current is to flow back from the head to the extremities. Then Public Opinion is to return to Congress, personally and through the press. In this way the legislator may know whether the proposed law is to the mind of the People. Here lies one of the great functions of the newspaper press in the Social Whole.

The House has its own life, twofold in the main; being separated into two parties, which

are divided upon many laws. The majority passes the law; the minority has a multitude of tactics to delay and to worry, besides discussion.

So far in the present Section each House has been considered as a self-governing unit, independent within itself, yet responsible for its conduct and even for its independence to the People. But in *Clause Fourth* both these legislative units are conceived as inseparable, each cannot fly off from the other in opposition to or in independence of the other. They are the Siamese twins of the Legislative Body, each is an individual with its own organic process, yet they are also bound together in a common process, that of law-making. They cannot separate in time (for more than three days) nor in place, cannot adjourn without mutual consent.

Interdependent we must see the two Houses to be, yet dependent (on the People) in their independence; all three terms are applied to them, yet form one process threefold. Contradictory the words appear on the surface, but they coalesce into one harmonious thought when their psychical movement is apprehended.

So the two-foldness of the Houses is one, with one end, the making of the Law. What does each put into the Law which is to secure Freedom? This Law is to be the voice of the State of States, bidding all to obedience. First, the House of Representatives (as before indicated)

is the spokesman of the People immediately, being chosen by the individual voters. Secondly, the Senate is the spokesman of the Single-State and mediately that of the People, chosen by the State Legislature. The People represented and the Single-State represented unite in one legislative Process. Why both? The State is different from its People as a mass. The State being called into existence by its People and having become an integral member of the Union, cannot be killed lawfully even by its own People, any more than the parent can lawfully kill his own child.

A State is a State through all the other States and is a part of their life through the life of the Union, for the United States can have no existence apart from the States. The Union is not a Single-State by itself with the accretion of other Single-States, but it is rather the idea — the soul of the National Body.

Can a State undo itself? Not without the act of the United States which made it a State. Hence the secession of a State meant death to the Whole, and forced the fight for the Union.

It would seem that the spirit of secession was stronger in New England than in the South at the formation of the Constitution. Rebelions arose first in the North. The transfer of the spirit of secession to the South came with the anti-slavery agitation in the North.

Rhode Island had the name of being the most recalcitrant State, and her conduct in the Congress of the Confederation did much toward compelling into existence the Constitution, which she at first rejected, having refused to send any delegates to the Convention; but finally when she was left out alone in the cold, she, too, concluded to ratify it, being the last State to do so.

The following movement will be noticed in the structure of the present Section: (1) the self-governing, internally self-determining character of each House as an organized body is set forth (First and Second Clauses); (2) the return and responsibility of each House to the People, who are to be informed of what their representatives are doing (Third Clause); (3) the inseparableness and reciprocal relation of the two Houses, forming one process and bringing forth one result (Fourth Clause).

The present Section, therefore, while asserting the individual independence of each House, at the same time asserts it as unifying both in one indivisible process of legislation. So we have each House in its individuality, and likewise Congress in its individuality; and next in Section Sixth we are to pass to the individual member of each House, the Self in it and of it, who is the original creative source of this whole process, and who also requires some protection as well as some restraint.

Meanwhile we cannot help being impressed with the subtle method by which the two Houses of Congress (in the Fifth Section) organize themselves, forming one cycle of three separate ideas: that of *independence* (each being self-governed), that of *dependence* (each always returning to and coming from the People), and that of *interdependence* (each revolving about the other). And, to go to the bottom of the matter we must reach down to the fact that this movement is ultimately the spirit's own, creator of the two Houses of Congress and of the Constitution as well as of all Institutions, here, of course, embodying itself in a special form for a special purpose.

ARTICLE I. — SECTION 6.

Cl. 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

Cl. 2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

In the present Section (Sixth), the individual member is considered as to his pay and his

rights; also certain prohibitions are placed upon him. The great object here is to secure his independence in order that each House of Congress may be independent in its sphere. If the member is dependent for his remuneration upon the Single-State or some outside influence, or is subject to external restraint for what he says or does in his legislative capacity, he is no longer free, no longer truly a representative. He is responsible to the House for his conduct in the House, though he is not permitted to violate general law without penalty.

In the previous Sections of the present Article, the chief stress was upon the two Houses as Wholes, separately and together. But now it is the member as individual who receives special attention. He has not been left unnoticed hitherto; particularly his qualifications for Senator and Representative have been designated. Still the main drift has been the organization of the two Houses as totalities, apart and in unity.

In *Clause First* it is settled that each House is to be a paid House; the function of legislator for the Union is considered to be worthy of remuneration by the Union. This was a new step compared to the European and especially the English prototypes, who do or did not receive pay. But such a provision makes for equality, since otherwise only the wealthy or the pensioners of

wealth could be legislators. It gives also for the selection of the best a wider field. But chiefly it secures the independence of the individual member, or tends that way. Moreover it is the basis of the modern social world that labor receive its reward.

Freedom from arrest (except in the cases indicated) and freedom of speech also secure the independence of the member, and therewith the independence of the House. Both these kinds of freedom are an inheritance from English History, which records a long and sharp struggle to acquire and maintain them.

But this independence of the member has its negative side; he may use his position and his freedom for purely personal ends. This introduces corruption into government. Such a possibility lies in all individual service, which may employ public position for private advantage. In *Clause Second* is an attempt to limit this freedom of the member by confining him to his legislative duty and its reward. He shall not hold two or more offices; he shall not as legislator make a place for himself, or increase the emoluments of a position which he intends to take. Very small, however, is this barrier against corruption, to which all free government is peculiarly exposed by its very virtue of securing Free-Will.

In looking back over the three preceding Sec-

tions (Fourth, Fifth and Sixth) we may observe that they have a common theme: they deal with the two Houses forming one Congress, two internally independent units forming one process with each other. Their common attributes are set forth; the prevailing word here is "each," which separates yet unites the two, making them alike in their distinction. Their essential continuity or perpetuity is asserted (Section Fourth); their reciprocal independence and inner self-government, coupled with their inseparableness are provided for (Section Fifth); finally the independence of the individual member is secured, yet with a proviso against his negative conduct (Section Sixth). Manifestly here is the thought of the two as one in mutual relationship and co-operation; or, if we may use the term, *the togetherness of the two* is brought out by constitutional provision and definition. Like man and wife in the Family, the Senate and the House of Representatives are twain in one Institution, which here is Congress.

If, however, we look still further back to the first three Sections of the present Article, we shall find that they are parts or stages of a larger Process, in which the last three Sections just considered constitute one part or stage, the third. This Process we may call the Process of Congress, whose stages are as follows: —

(1) The primal conception of Congress in its self-division into two Houses (Section First).

(2) The distinctive Process of each House separately given (Sections Second and Third).

(3) The unity and mutual co-working of both Houses, independent, yet inseparable (Fourth, Fifth and Sixth Sections).

The whole constitutes the one Congress in its process of primal or implicit unity, then separation, then back to a unity which is explicit and active. Such a process is at bottom psychical, reflecting the very movement of the Self creating it, truly a Psychosis; we may call it specially the Congressional Psychosis.

As we have been dealing with the individual member of Congress in this (Sixth) Section, the question comes up: What does he represent? His District, State, or the whole Nation? Or some corporation, some commercial or industrial interest which may have had the chief hand in electing him? Or perchance himself, in one or the other of two possibilities—his self-interest or his conviction of duty? Of course, every member will say the latter, though he will usually try to make it square with the former. As the constituents of the Representative are primarily limited to a given territory he will naturally be expected to represent them in their various interests and political beliefs; the Senator being elected by the State Legislature is supposed primarily to represent his State. Then the Single States form themselves into groups according

to locality, interest, conviction, development There is a Northern and Southern, an Eastern and Western Statehood; mountain States and valley States; old States and new; three sets of coast States with multitudinous diversities; backward States and progressive; and so on. But across all these distinctions cuts the division into parties, deepest of all, which must be represented likewise.

Here is intricacy enough, which cannot now be untangled in its details. But, in general, one may say that the member of Congress is to legislate for what created him and gave him his present function. The Union is what produces the State, and through the State the Congressional District, rendering a representative from each possible. Fundamentally he is to legislate for the totality, for the whole United-States, through which his State gets to be, and also he himself as its representative. Otherwise his act would be self-destroying, contradictory, absurd; he would not secure Free-Will, the end of all States, but would violate it in its supreme manifestation. This does not mean that he is not to represent his special District or State or group of States, in forwarding the interest of the Whole; but it does mean that he is not to seek their advantage to the detriment of the Whole. In this country not one Single-State is the governing State, but each

is through all, and all through each; and the member of Congress is to represent all through his own District or State, and the latter through all. His basic thought should be to legislate for the Union as State-producing in its widest and deepest sense, and not for his State or group of States to the injury or destruction of the total Union. The State-producing Union through the Union-producing State is the soul of the Constitution which the legislator is to be perpetually incorporating in the Law.

We have now come to the end of the movement of Congress with its two Houses; next we have to take a new step in the unfolding of the Constitution. The totality of Congress is itself but a part or stage of the entire Law-making Process, which now must round itself out with a third element—the President. We have observed that Congress by itself cannot fully enact a Law, though it initiates bills and unites on them. These have, however, to go through the presidential ordeal before becoming a Law for enforcement. This is the subject of the next Section.

ARTICLE I — SECTION 7.

Cl. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Cl. 2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not, he shall return it with

his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment, prevent its return, in which case it shall not be a law.

Cl. 3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

With the exception of the first short Clause, the present (Seventh) Section pertains to the President, not directly as executive or administrative, but as an element of the Law-enacting process. Hence he appears at this point in the legislative Article, along with the two Houses of Congress. In a sense he might be called the third House, as every bill which becomes a Law has, in one way or another, to pass through his hands. The President, however, as holding the executive Power of the Nation, is part of a dif-

ferent and more sovereign process, namely, that of the total government. In this function he will have an entire Article to himself (Article II), co-ordinate with the present legislative Article, just as his Power is co-ordinate with the National Legislature, of which, nevertheless, he too is a part.

In *Clause First* we find the initiative of Legislation mentioned; revenue bills "must originate in the House of Representatives." This proviso has an historical origin and is copied from the House of Commons. It shows that the men who made the Constitution were full of the struggles of English History, and especially of the long-continued contest between the Kings of England and the Parliament over the right of levying taxes.

The Clause calls attention to the power of initiating bills, which power is common to both Houses except in this case. The President can likewise suggest legislation in his message, though he cannot formulate and introduce a bill. So we may say that the power of initiating the new law may be exercised by the Senate, by the House, or, more remotely by the President, that is by either of the three Law-enacting elements already designated.

But whichever element makes the start the other two have to co-operate with it to bring forth a Law. The process is the initiation of the

Law in one branch (1), its acceptance by the other (2), its confirmation by the President (3). To be sure the second branch can reject the bill, when it is lost, and the President may veto it, which can be overcome by a two-thirds vote of both branches.

Thus the President has a decided legislative function. It is so pronounced and so different from the English Constitution since 1688 that we may deem it the result of a reaction toward increasing the Executive Power. One ground which the framers of our Constitution had certainly not forgotten was that Parliament was the aggressor in the conflict with the Colonies which precipitated the War of the Revolution. The legislative Power, too, could become oppressive and so is to be limited; hence executive consent must be made an integral part of the Legislature. In England the legislative Power had put down the regal or executive Power; against this excess a reaction had arisen during the hundred years following 1688, which shows itself not only in this Constitution, but also had its influence on the contemporary government of George III. Then the speculative political thought of the time had strongly emphasized the co-ordination of the three governmental Powers — legislative, executive, and judicial. This was especially the work of Montesquieu. Moreover the President was chosen by the Peo-

ple as well as Congress; the two were thus equal in origin, and should be equal in authority, each within its sphere. Finally the Presidency was put under the Constitution, and belonged not by right of birth to a certain person for life. So the executive Power is made to take its true place in the governmental Process.

The legislative participation of the President is usually confined to the following acts: by message he can recommend a law to be passed; approval of bills passed by the two Houses; veto of bills passed by the two Houses; he can call Congress together for an extra session.

The veto power is a development from England where the Crown once had and still has theoretically an absolute veto. Queen Anne is said to have been the last English sovereign who exercised the veto power (in 1707). Now it is a constitutional right of the king, which would be deemed unconstitutional for him to exercise—a contradiction truly English.

The President has not an absolute but a contingent veto; that is, it may be set aside by a two-thirds vote of the Houses. The legislative value of the presidential veto may be thus ascertained. In a House of Representatives, composed of three hundred members (let us suppose), a bill would become a law by a majority of one if the approval of the President were secured. But if the President vetoes a bill, he

thereby votes with the minority, and it would require 200 votes out of the 300 to pass the bill over his veto. If 199 votes are for the bill and 101 against it, a veto will kill it, which in such a case means 98 votes against the bill. The legislative totality or the *three* Houses would then show an equivalent of 398 votes, of which the President counts for not quite one-fourth in his negative capacity of vetoing. His positive capacity of approval is less striking, he has apparently far more power of undoing than of doing, yet what he can do is to be measured by what he might undo if he chose. Such a strong break-water did the Fathers erect against too much law-making.

What is true of the House of Representatives, is equally true of the Senate. *Clause Second* requires of both Houses of Congress a two-thirds majority for overcoming the Presidential veto. This increases considerably the power of the veto, for the unlikelihood of the two Houses agreeing by such a decisive majority is great. Thus we begin to appreciate the negative might of the President in what we have named the Law-enacting Process. In this respect he is something more than a third House, being such a strong participant in both Houses. Less trouble has come from this arrangement than one might expect; only once, in the time of Andrew Johnson, did a very serious rupture oc-

cur between Congress and the President. Some Presidents have never used the veto, most have used it sparingly, but it is not likely to fall into disuse, as in England.

Thus the Law, before it goes forth fully enacted to the People, must pass through the Single-Will of the one-man power representing the unity and sovereignty of the Nation. This concentration of the whole People into one Self is the President, through whom the abstract Law is endowed with a Will which brings it back home to the People whence it originally came. The Law may be conceived to rise out of the multitude, to go through the representative Many (the House), then through the representative Few (Senate), and finally through the representative One (the President). The last is to return to the beginning and apply their own Law to the multitude, who through this institutional process are obeying themselves—not their momentary caprice but their own eternal Law. Thus the Executive is not a mere machine moved externally by the legislative Power, but is an inner integral part of the legislative Process.

It will thus be seen that the President has in himself, in his Ego as Will, the point of the return of the Law to the People. The Law moves from the outer periphery of the Whole to its innermost center in the very Self of the President, who, so to speak, wheels it about through

his Will, and gives to it thereby what is called his executive Power, which can be only Will. Such is what may be termed the returning element in the Ego of the President, which makes him psychically the third part or party to the total Law-enacting Process, as hitherto described. Already we have seen the House as the immediate representative of the People, the Senate as the mediated representative (through the Single-State); the President may also be deemed the immediate representative of the People, but as returning to them their own Law. But first it must pass through his own Ego, must be enacted by him as a part of the Law-enacting Process. To be sure, the total Legislature can perform this last act by itself through a two-thirds majority.

Likewise the President has a judicial function, he is a judge of the Law, especially of its constitutionality, since he is sworn to "preserve, protect and defend the Constitution of the United States." Still his judgment is not final, it may be set aside by the two-thirds majority of Congress. But the Supreme Court has the final legal arbitrament of what is constitutional, though the People may ultimately reverse this Court. The President, however, judges of the constitutionality of an act before its execution, the Supreme Court after its execution, in an actual case brought up for trial.

So we see that the executive Power has, just in this legislative part of itself, a very important judicial element which it is compelled to exercise before the approving or disapproving of a bill. The President, in order to perform fully his legislative deed, has to make himself judge of the Constitution. Like the House and like the Senate he must exercise all three governmental functions in order to perform rightly his one special function of government.

The Constitution plainly discriminates between the President as the third element of the Law-enacting Process (along with the two Houses of Congress), and as general Executive and administrator of the government. In the former case he is in one legislative movement with Congress, taking up their enactment, and, as it were, re-enacting it in himself and endowing it with Will, not simply his individual Will, but the Will of the whole People, whom he represents. At this point the President as legislator connects with the President as executive, in which function he is to be considered later (see Article Second of the Constitution).

It is noteworthy how, in *Clause Third*, the Constitutional Convention endeavored to secure the President in his legislative function, and to prevent Congress from usurping it by giving to a bill another name. Nothing could more strongly affirm the President as a co-ordinate and

integral element in the enactment of the Law. The Clause seems also to hint the suspicion of the Convention where lay the danger of usurpation. Evidently the Constitution means the veto power to be real — a fact which has been sometimes overlooked in the heat of partisan controversy.

We have now considered seven of the ten Sections of the legislative Article embracing the Organization of the legislative Power with its three Law-enacting constituents, the House of Representatives, the Senate and the President. Having thus put together our machine (so to speak), we are next to see what it has to do, with what materials it works in its process. This brings us to the next (second) division of this First Article as a Whole.

II. THE APPORTIONMENT OF LEGISLATIVE AREAS. So we shall designate the subject-matter of the last three Sections of Article First of the Constitution. We see here the attempt of its framers to parcel out the vast incoming territory of future Legislation, a territory even greater than the outer physical domain of the United States, to which it bears a strong analogy. A legislative field expands before us more extensive than the Mississippi Valley, outreaching any present conception. As the broad plains of the West are to be ordered and organized preparatory to settlement, each State, county, township

and farm being duly laid out and bounded, so must there be a similar limiting and apportioning of the far-stretching public domain of future legislation, which is truly the organizing principle lying back of all settlement and habitation by man.

It is manifest that these three Sections form a unity by themselves, different from yet co-ordinate with the preceding seven Sections of Article First. The latter, as already set forth, deal with the organization of the Legislature, showing its entire process of formulating a Law, which is the very purpose and outcome of it. But to extract a Law there must be some material put into the legislative machine, and this material must be arranged and classified beforehand by the Constitution.

Coming back to our image of legislative areas we find that they can be divided in several ways. The first and most natural division is that of the United-States and of the Single-State, each of which has its own legislature and consequently its own legislative area. In the Seventh Section certain distinct powers are granted to Congress by the Constitution. As the Single-State existed previously and did its work of law-making, it is natural to infer that all other powers not granted by the Constitution to Congress, belong to the Single-State. In fact there is a special clause (the tenth Amendment) which declares

that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People." This would make the simplest possible division into two legislative areas, that of the United-States and that of the Single-State, the latter being supposed to have originally the whole jurisdiction, from which the Constitution slices off the powers of Congress.

But this simple division or positive assignment of two areas, is immediately met by a negative or prohibitory assignment whose underlying presumption is just the opposite of the preceding division. The Single-State cannot then take the whole area outside of the powers granted to Congress, as certain things are prohibited to it. Still further, Congress has explicit prohibitions put upon it alongside of its explicit powers granted. By the first division we supposed it could only do what it was permitted to do, and all else was forbidden. But these special prohibitions imply at the first thought that Congress can do all that is not forbidden to it. The first thought, however, is not enough: we shall have to take a second and even third thought in this matter.

Nor does the Constitution stop with these two kinds of prohibitions, upon Congress and upon the States. There is the third kind: certain matters are prohibited to both, for instance

neither one nor the other can pass an *ex post facto* law. Three prohibited areas we must (so to speak) inclose in the field of legislation.

It is manifest from the preceding facts that the Constitution seeks to define legislative areas directly and not by implication. The granting of certain stated powers does not carry with it the denial of all powers not stated; the prohibition of certain stated powers does not mean the permission of all others not stated. There is a similar suggestion underlying the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny" others not so enumerated. Herein we may trace the reason for the foregoing procedure. Underneath this written Constitution there is a larger unwritten one, active and needful; it is not possible that all rights and powers can be at once for all future time written out in such an instrument. So we have here the idea that there exist constitutional rights (and perchance powers) not enumerated in the Constitution. So these descendants of Englishmen had, like England, an unwritten Constitution also. It is then a rule of construction that an enumeration shall not be construed to determine what is not enumerated; this must be specially defined by itself. Beware of inferences as to legislative areas either granted or prohibited to the United-States or to the Single-State, or to both.

We shall, then, have to describe specifically each area. Six distinctly appear in the Constitution as the result of this twofold interplay of grant and prohibition with the twofold political Institution, the United-States and the Single-State. Six areas, three positive or granted, and three negative or prohibitory; we may set them down as follows:—

1. Area vested in Congress.
2. Area vested in the States.
3. Area vested in both.
4. Area prohibited to Congress.
5. Area prohibited to the States.
6. Area prohibited to both.

Thus there are two common areas, one of grant and the other of prohibition — areas common both to Congress and to the States. For instance both have powers of taxation, both can legislate upon bankruptcy, each has the power of determining matters concerning the election of Senators and Representatives. On the other hand both are prohibited from granting a title of nobility and from passing an *ex post facto* law, and, it may be, other prohibitions are common to both, such as a law impairing the obligation of contracts. But this latter prohibition is explicit only as regards the States (Art. I. Sect. 10), but implicit as regards Congress (not expressly prohibited). Accordingly there rises the question: When can a prohibition be implied

though not expressed? Here comes into view an unsettled area of legality, which sooner or later must be occupied by the law. Then when areas have been granted in common, how shall possible conflict be avoided except by adjudication or some new legislation?

Thus we begin to behold another vast field of the Law yet to be possessed and settled. It is the unoccupied legislative domain, the future sphere of legal development, the potentiality of the Constitution. The process of law-making shows no signs of stopping, indeed cannot stop without breaking the balance wheel of civilization.

The development of the country calls out all sorts of legal conflicts, which are to be solved by fresh legislation. Industry, transportation, commerce, are increasing, shifting, making new paths, upsetting old relations. In fine, the Social Whole with its individual exploitation must be every day subjected anew to the Law, otherwise freedom, the great end of the State, is jeopardized. The outer world is continually bringing up new collisions with freedom both individual and institutional. The State with its Law is the grand protector of this freedom against all its enemies, inner and outer. The result is a new legislative territory is incessantly rising out of the sea of the future, and needing apportionment and organization. Here lies the frontier

of the Law, the borderland of conflict between Congress and the States till each gets its legal area definitely settled. And this legal borderland was in deep correspondence with the physical borderland, especially in the case of Kansas, on whose soil began the fierce preliminary struggle between the right of Congress and the right of the Single-State, which wound up in the Civil War.

Accordingly in addition to the area granted and the area prohibited, we have come upon a third kind of area which is not yet either granted or prohibited, but is the possibility of either, of both, and of neither—hence truly an area of possibilities. So to our six defined areas is annexed a new set of areas, the undefined, the potential, the legally unsettled which is to be settled, the unapportioned which is to be apportioned.

But how apportioned? Evidently by the Constitution with the method already developed, which is the six legislative areas. Now we may see the movement of the whole in the following table:—

1. Positive Areas — those apportioned by the Constitution.

- a.* To Congress.
- b.* To the States.
- c.* To both.

2. Negative Areas — those denied or prohibited by the Constitution,

- a.* To Congress.
- b.* To the States.
- c.* To both.

3. Possible Areas — the unapportioned but apportionable.

- a.* To either (Congress or the States).
- b.* To neither
- c.* To both

Such would seem to be the look over the field of both actual and possible legislative areas with all their divisions. It is evident that the whole field is perpetually changing, its boundaries shifting. The possible has to be made actual in the unoccupied or unassigned areas, which are continually showing themselves in fresh contingencies. The above-named possible areas might be called disputed areas, which have to be assigned to the rightful claimant by some superior authority.

But also the actual areas, both granted and prohibited, have their changeful, shifting phases. The Constitution with all its enactments and its fixed formulas is itself in the process, is subject to evolution, which, however, does not mean revolution, at least not sudden overthrow. A fresh adjustment of the old, and a settled apportionment of the new, legislative territory are taking place all the time.

As already stated, there are three Sections (Eighth, Ninth and Tenth) of Article First de-

voted to this apportionment of legislative Areas. The Eighth Section is the positive one, declaring directly in eighteen Clauses the powers granted to Congress. The other two Sections are prohibitory, the Ninth in a general way for the most part, but the Tenth is more special, giving the prohibitions upon the States. These three Sections we shall glance at separately.

ARTICLE I. — SECTION 8.

The Congress shall have power —

Cl. 1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

Cl. 2. To borrow money on the credit of the United States;

Cl. 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

Cl. 4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

Cl. 5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;

Cl. 6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

Cl. 7. To establish post-offices and post-roads;

Cl. 8. To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries;

Cl. 9. To constitute tribunals inferior to the Supreme Court;

Cl. 10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

Cl. 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

Cl. 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

Cl. 13. To provide and maintain a navy;

Cl. 14. To make rules for the government and regulation of the land and naval forces;

Cl. 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

Cl. 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

Cl. 17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and,

Cl. 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

This Section (Eighth) enumerates the main powers granted to Congress by the Constitution, the latter declaring the Will of the People. Or, it marks out the legislative area and divides the same into convenient lots (or Clauses), each of

which has a brief but significant label. The whole shows the apportionment to Congress of its legal territory.

First of all the power of taxation is granted, and with the same the various ways in which the money may be spent are designated. The People here give to their representatives the right to take and spend a certain amount of their property, which is the product of their effort, their Will realized. Thus the People by their own labor secure the State, whose function is to return to them, and secure their Will in its free activity. They would have no property, at least no security for the same, were it not for the State.

So a slice of every man's effort is taken (by taxation) to secure the whole of it through the Institution. Very important is such an act, both in the manner of levying the tax and in the way of spending it, for it can be so levied and so spent as to jeopardize and even destroy freedom. Hence the people have been very jealous in both these regards, particularly the Anglo-Saxon people. The history of the Colonies and the antecedent history of England largely turned on the question of taxation. Nothing would heat the Englishman to the fighting point so readily as the attempt to take his money arbitrarily and use it for the purpose of undermining his freedom. Yet the necessity of taxation is absolute for the

modern State, and it may be said that the Nation which can raise the most taxes in the best way and for the best purpose is the strongest and greatest Nation.

It is not our intention to consider all these eighteen Clauses separately as that would require a long commentary. In general the Constitution here touches Society as such or the socio-economic Order, which turns upon Property or the acquisition of Wealth. This, at the present time, is what furnishes the chief matter for legislation. The great question now is: What is to be done with the new Monarch, the industrial conqueror, who through the Social Order, has acquired a kind of absolute power? Can he be put under the Law? Evidently the National Legislature alone can completely reach him, though the State Legislatures have been the first to grapple with the giant. He is not to be destroyed, for he is a genuine and indeed necessary product of social evolution, but he is to be subsumed under Law and made responsible to the State.

Society, specially in its American form, fosters individual activity supremely, and gives to it a vast field for business organization, which can become hostile to freedom, and so calls for the interference of the State. The Monocrat (as we may name him) is the new one-man power, not of political but of social origin, whom the National Legislature has to subordi-

nate to the Law, which must utter its command to him also to will Free-Will universally, and not his own personal interest against that of all. A new Clause of this Section might read: Congress shall have power to bring the social Monocrat under the Law. But is there already any such power granted in this Section? That depends upon how it is construed. So we come to a subject which springs chiefly from this Section, and which has had an important place in the history of the Constitution from the beginning, namely the strict and loose construction of the instrument.

In *Clause Eighteenth* Congress is granted the power "to make all laws necessary for carrying into execution the foregoing powers"—which grant follows of itself from the granting of the original powers. Still further, Congress has the power to make all laws necessary for carrying into execution "all other powers vested by this Constitution in the Government of the United States"—which brings up the question: What are these *other* powers? Here we may for a moment turn back to the Preamble which says that one purpose of the Constitution is "to promote the general welfare," and Congress has to make laws for the attainment of that end. Another and the chief purpose is declared to be this: "to secure the blessings of liberty to ourselves and our posterity." What laws will promote the

general welfare and what will secure the blessings of liberty must depend on the judgment of Congress. This is the loose construction of the Constitution, which substantially goes back to the most general statement of the end of all government, namely, the securing of Free-Will through the Law. The difficulty of such a construction is that it almost does away with the rest of the Constitution, at least with the other Clauses of this Article.

The strict constructionists, therefore demand that the power must be definitely granted by the Constitution if it is to be exercised. But such a limitation in its turn does not work successfully. The words of the Constitution often imply that Congress can exercise powers not expressly granted or even mentioned in the instrument. For instance, "no bill of attainder, or *ex post facto* law shall be passed;" the implication is that Congress might pass such bills if there were no prohibition. Several other prohibitions imply a like power nowhere specifically granted.

What is the solution of the difficulty? As the Constitution is doubtful or rather double, every important law must go back to the People, the source of the Constitution. This is accomplished through Political Parties, one of which has been strict and the other loose constructionist. The further fact is significant: Each party has vio-

lated repeatedly its fundamental tenet in this respect. Jefferson, the great defender of strict construction, disregarded his own principle in the Louisiana purchase, for which there was no constitutional sanction. But Congress and the People have sealed his act with their approval; indeed the irony of history has converted it into the greatest deed of his life.

Nor must we pass over the last phrase of the present Clause, alluding to "all other powers vested by this Constitution * * * in any department or office thereof." What are these powers, especially the implied ones? In order to preserve and defend the Union, can an officer of the United States suspend (for instance) the *Habeas Corpus* act? The Executive has done so, with the approval of the People. The final rule of construction would seem to be that the universal end of the Constitution must be asserted when vitally obstructed by a special provision of its own. The Constitution may get entangled with itself in some unforeseen emergency, the special may contradict the general, the spirit may be assailed or even destroyed by the letter.

This twofoldness of construction is called up by the present Clause, and hence it has been termed the elastic Clause, as it has been and can be stretched to cover the implied powers of the Constitution—powers which have to be con-

strued by the individual exercising them and so have a large subjective element. Here indeed lies the danger of loose construction.

Then it must not be forgotten that an unwritten Constitution lies underneath and around this written Constitution. It reaffirms a *Habeas Corpus* law (with exception designated), but negatives wholly an *ex post facto* law, both of which laws are pre-supposed by it to exist, or to have existed. Construction has to invoke these legal and historical pre-suppositions for explaining the Constitution, which, original as it is, has its roots in the past on every side.

Doubtless the first source of loose construction lies in the Preamble which declares the universal end of the Constitution in brief words. On the other hand, the origin of strict construction lies in the special provisions of the Constitution itself, which have their own special ends. The Eighteenth Clause of the present Section simply brings to the surface the possible conflict between these two kinds of ends, both of which exist and must exist in the instrument. And yet they can be and have to be reconciled by right construction, which may be called sometimes strict and sometimes loose.

ARTICLE I. — SECTION 9.

Cl. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year

one thousand, eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Cl. 2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Cl. 3. No bill of attainder or *ex post facto* law shall be passed.

Cl. 4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Cl. 5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

Cl. 6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Cl. 7. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign State.

The prohibiting element comes emphatically to the front in the Ninth Section and is continued through the following Section. The general character of these constitutional prohibitions, including their areas, has already been considered. In the Ninth Section, the United-States chiefly is made the object of certain prohibitions in the use of its legislative and also its executive Powers.

The first limitation here is placed upon Congress by *Clause First*, prohibiting it from interfering with the slave-trade till 1808. Again we notice how gingerly this disagreeable matter is touched upon, reflecting doubtless the repugnance of a majority of the Convention. The word *slave* is not mentioned, as making too shrill dissonance in a document whose end is the free man in a free government. But the slave is called a person though with a careful circumlocution: "Such persons as any of the States now existing shall think proper to admit." Still the contradiction is heard in the two words, *migration* and *importation*, the former applicable to persons and the latter to things. This was another stage of that compromise with slavery which has in it one of the greatest days of reckoning that the world has ever witnessed, a real Last Judgment held here on this earth.

We may count at least ten of these prohibitions in the seven Clauses of the present Section. They are chiefly laid upon Congress, which is thus pre-supposed to have the right of prohibiting the slave-trade for instance, unless prohibited from prohibiting it by the Constitution. In this case Congress is prohibited from interfering with the Single-State. But the prohibition "No bill of attainder shall be passed" would seem at first to apply both to Congress and to the Single-State. The same is true of a number of

these prohibitions. But when we read in the next Section that "no State shall pass any bill of attainder," we are thrown back to the conclusion that the Ninth Section is intended to apply only to the United-States. Still when we read "the writ of *Habeas Corpus* shall not be suspended," the question rises whether this prohibition extends to the Single-State as well as to the United-States? And in the latter case, is it Congress or the Executive that has the power of suspending it, or both? Thus a great field opens up as to the limits of these prohibitions, an unsettled area which has to be settled.

In examining the wording of these prohibitions of the Ninth Section, we find three different kinds: (1) It shall not be done *by Congress* (First Clause), (2) it shall not be done *by the United States* (Eighth Clause); (3) simply *it shall not be done*, not saying by whom. This last way of phrasing is employed in nearly every prohibition. What does such a change in phraseology mean? Naturally one concludes that the attempt is to make the prohibitions more general by not limiting them. What then is to be supplied? This is the case which we have just been considering (the case of the writ of *Habeas Corpus*).

It is evident that the prohibitory enactments of the present Section are given a wider area, are worded in such a way that they are made to ex-

tend over a greater field than those of the following Section, which are concentrated expressly upon the Single-State. Let the student compare the manner of the two prohibitions in regard to the same matter: "No bill of attainder *shall be passed*" (Ninth Section), and "*No State shall pass any bill of attainder*" (Tenth Section), and he will see the difference in the composition and in the spirit of the two Sections, though both are negative and prohibitory.

ARTICLE I. — SECTION 10.

Cl. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

Cl. 2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger, as will not admit of delay.

In Section Tenth the prohibitions are expressly imposed upon the Single-State. We should note too a significant difference in arrangement; the

prohibitions are briefly bunched together into a Clause (see the First Clause), whereas they are scattered along in distinct Clauses specially paragraphed for the most part, in Section Ninth. The mental effect is in the one case that of dispersion, in the other that of concentration; the first kind of Clause rays itself outward over several possible objects; the second kind of Clause gathers itself inward upon one object.

There is likewise a notable difference between the two Clauses of Section Tenth. The first contains unconditional prohibitions, the second contains those conditional upon "the consent of Congress." For dispensing with the first set no permission can be given according to the existent Constitution; for dispensing with the second set the permission of a higher authority, Congress, may be obtained. Here are suggested three grades of authority — Constitution, Congress, the Single-State.

When we look closely into the prohibitions of *Clause First*, we find important differences among them. They all agree in being prohibitions put upon the States, but they disagree in their relation to Congress, or to the Government, upon which some are prohibitions also, some not, and some doubtful. This fact we may bring out more fully.

1. The things prohibited to the States, but granted to the Government: (*a*) treaty-making

power; (*b*) the granting of letters of marque and reprisal; (*c*) the coining of money. These distinctively are functions of national sovereignty, which the Single-State cannot exercise but the Nation must.

2. Things prohibited to the States, but may or may not have been granted to the Government by the Constitution: (*a*) the issuing of bills of credit (paper money); (*b*) the making of anything but gold and silver a legal tender in payment of debts; (*c*) the passing of any law impairing the obligation of contracts. All three of these propositions are closely connected together in law and in logic. Here rises the much-debated question: Is paper money constitutional? It is on record that the Convention which framed the Constitution voted down the proposition to grant to Congress the power of emitting bills of credit. On the other hand it did not prohibit such power in the place where other prohibitions are inserted, though the matter was discussed in the Convention. The Supreme Court has, as is well known, given two opposite decisions on the point, the last one being in favor of the constitutionality of the Legal Tender measure. There is also a question whether Congress can pass a law impairing the obligation of contracts. A Chief Justice (Chase) once affirmed that it could not, without being authorized by the Constitution. Then again it

has been a question to what extent the Legal Tender act impaired the obligation of contracts.

3. Things prohibited to the Single-State, but also to the United-States or to Congress: (*a*) the granting of any title of nobility; (*b*) the passing of any bill of attainder or *ex post facto* law; (*c*) the levying of a tax on exports. (*d*) To these is doubtless to be added the suspension of the writ of *Habeas Corpus*, yet with the exceptions designated in Section Ninth.

So much for the *First Clause*, whose form of prohibition is unconditional; the *Second Clause* gives the prohibitions which may be set aside by the consent of Congress. The Single-State is prohibited from keeping troops in time of peace. This prohibition, however, must be taken in connection with Second Amendment, which provides that "the right of the People to keep and bear arms shall not be infringed," and evidently grants to the Single-State the power of organizing a militia, which indeed is presupposed in Section Eight, Clause Sixteen.

Here we conclude the second part of the Legislative Article which we have called the Apportionment of Legislative Areas, embracing the last three Sections (Eighth, Ninth and Tenth). It is an intricate subject and is not very distinctly or altogether consistently set forth in the Constitution when connected with the Amendments. It is the great field of national litigation since it

furnishes either directly or by implication two sides to so many questions which arise in its domain. This comes from the twofold interplay of grant and prohibition upon their twofold objects, the United-States and the Single-State.

The Constitution, having now partitioned and assigned its various fields of legislation, opens into a vast new legislative territory, the unsettled and unassigned, which is to be settled and assigned. The Future keeps flowing in, and demands adjustment and apportionment in the light of what has been done by Law and Constitution. Thus the Legislative Power as hereinbefore set forth must ever be at work in its vital, Law-enacting process, applying these Areas to the new conditions.

The framers of the Constitution sitting in Convention, were descended from the Past, but had their faces set toward the Future. They had inherited a vast field of legislation from their English ancestry; this old field, however, has to be newly partitioned in accord with the new order established by the Constitution. Such a partition is the object of the last three Sections of the present Article. But opening into this old field is a new field which must be possessed and apportioned.

We shall try to present to the view of the reader a diagram of this complicated subject, which has previously been outlined in the form of a table (see p. 173),

Areas to U. S.	apportioned : to both.	to States.
Areas to U. S.	prohibited : to both.	to States.
Areas to one or the other.	apportionable : to both.	to neither.
The Future open.		

By leaving the one end open we strive to suggest the ever-coming Future rising out of the unknown and forcing itself into the Present irresistibly with many a conflict which has to be settled by the Past with its law, whereby the new and unfixed becomes the old and fixed.

But this is not the only process here. The right of Congress over some legislative Area claimed by it may be contested by the Single-State or even by the national Executive. Thus a new apportionment of Areas granted or prohibited to Congress or the Single-State must be

always taking place. That is, behind these three Sections of grant and prohibition lies a power that is continually granting and prohibiting just through their efficacy as constitutional enactments. .

In general, we have in this portion of the present Article the adjustment of the old legislative domain, the inheritance of former ages, to the new constitutional order, especially as regards Congress and the Single-State. Thus it is psychically the second or divisive stage of the present subject, which fact is indicated by the word *apportionment*. So much for the old domain, which, as existent, could be divided up and assigned by the Constitution.

But next comes the new legislative domain, extra-constitutional, flowing in upon the Constitution with its old divided domain. Now this new domain must first be possessed, and then divided likewise, in accord with the Constitution.

This is the third stage of the present movement of Legislative Areas, which, at first lying outside the Constitution, must be taken up and made inside, thus becoming an essential part of the legislative process, and being incorporated in the legislative domain.— But just here a conflict is possible between Congress and the Single-State. Still we see the continual round or process of the present Article (legislative) settling and apportioning these new Areas through the organism

of the national Legislature. Finally, we shall observe this whole legislative process reproducing itself in a new State, which has likewise its Legislature.

To this third stage, though not mentioned in the Constitution, as it lies outside of it and beyond it, we shall devote a few words.

III. THE NEW APPORTIONMENT OF LEGISLATIVE AREAS. This is incessantly going on, for the conflicts between the United-States and the Single-State in the matter of legislative supremacy are incessantly coming to the surface. Congress or the State Legislature may make a law covering the same field; which has the constitutional right of law-making in the given case?

Here enters the National Judiciary which has in the main the function of deciding such disputes. It has to apply the principle of granted and prohibited powers to existing questions of jurisdiction between Congress and the States. The court of last resort must have the general authority to assign these disputed Areas of Legislation, apportioning them usually within the six boundaries indicated in the last three sections of the First Article of the Constitution, which we have just been considering.

At this point, then, we pass beyond the purely legislative domain of the Constitution and invoke a new Power, the judicial. Thus the law-making Process by itself shows its limitation and calls

for another element of the total Constitutional Process. It is the duty of the Supreme Court to put into fixed legal bounds the undefined and conflicting claims of the various legislative powers.

Still these fixed legal bounds, though established by the Supreme Court, do not remain fixed forever; they are in a still higher Process, and the Supreme Court itself is in it. The National Judiciary has changed in its attitude toward just this subject; it may permit Congress to encroach upon the States or the States to encroach upon Congress. In the hundred and more years of its existence, it has in one epoch (under Marshall) leaned the one way in its decisions, then in another epoch (under Taney) it has leaned the other way. This is only saying that the grand establisher, the conservator, the Highest Judiciary, is subject to a Tribunal still higher, namely, the whole triune Process of Government, which in its turn must share in the total progressive movement of Civilization.

It should be added that the Executive Power in a war or in an emergency has disregarded the limits of these legislative Areas, though marked out by the Constitution and confirmed by the Supreme Court. Thus enters the single Will of the chief Magistrate into this carefully divided and fenced-off field of the Legislature, and, having to act in a sudden crisis for the whole Na-

tional Will, sweeps down all the fences of the Law which stand in the way of the supreme end of the Nation. And in this case Congress may sanction, and, indeed, has sanctioned, the abolition of itself, and has made legal the setting-aside of the Law. Thus, the President, the centralized Will of the whole People, may make a new temporary Apportionment of Legislative Areas, in a time of great danger to the State. Here, then, the executive Power breaks into the legislative, and even judicial Powers, and limits them anew, but only for a time. So there is a continual new Apportionment of Legislative Areas going on, chiefly through the Judiciary, and a possible new one always latent in the Executive.

In the diagram (p. 186), on the open side, we observe the ever-rising Areas which are to be apportioned to the United-States or to the Single-State, or perchance to both, or, again, to neither. This last case we may dwell on for a moment. There may come up a field of legislation, which cannot be assigned to Congress or to the Single-State, as no constitutional provision has been made for such a purpose. The acquisition of Louisiana is an example. It was the work of President Jefferson in 1803, who was a strict constructionist, and who believed that there was no power granted in the Constitution for acquiring that territory. Yet he did the deed and was applauded by Congress and by the country. The

opportunity came and it had to be seized at once. Here, then, suddenly arose a vast legislative Area (that of territorial acquisition generally and that of Louisiana specially), which was by the Constitution apportionable neither to the United-States nor to the Single-State. But the executive Single-Will, representing the national All-Will, took the place of the slow process of a constitutional amendment, and acted in the sudden exigency, with the approval of the whole nation.

Here we see that the legislative Power, even with its constitutional sources, has passed into the one man's Will, the executive Power, which, however, is also created by the Constitution. This does not mean that the legislative Power is destroyed, but that it by itself is not self-sufficient for government, is really but a part of the total process of government. Hence it calls forth the Executive by its own inner necessity and so this Power is to appear next in our exposition, just as it appears next in the Constitution.

But ere going forward let us cast a glance backward. The legislative Power has now come to its end, in fact has ended itself of its own inherent movement. We first followed it through the organization of its manifold intricate processes, forming the most fully developed portion of the Constitution. These processes we may briefly summarize as follows: first come the three consecutive elements, House of Rep-

representatives, Senate, and President; next, each of these is seen to have singly its own inner process; then, two of them (House and Senate) are set forth in their double process, which is that of Congress; finally all three are brought together in their triple or law-enacting process. The legislative organism being now ready, the Constitution passes to the ordering of its materials, or to what we have called the Apportionment of Legislative Areas, which we have sought to make visible by table and diagram. But we found that this Apportionment led us into a new world to be apportioned, and this again has carried us wholly out of the legislative realm into that of the executive, with which we may now start.

II. THE EXECUTIVE POWER.

The Law, having passed through the legislative process, and being thereby declared and made ready, must next be executed, must be rendered valid and real in the world. This is accomplished through Will, the active element of the Self (psychically the second stage of the Psychosis of the total Ego). A single Will thus appears as executive, and in this Constitution is known as President.

More distinctively is the one-man power, which is here designated, the inheritance of the ages than any other constituent of Government. The

President in this regard has a long ancestry descending through the Monarchs of Europe and of Asia, through the tribal chieftain and the patriarch of the Family, perchance coming down even from the animals, which also have a single ruler of the herd.

The President is the national Self or Spirit concentrated in one Person, who thereby represents the authority and majesty of the Nation. In him the People, made up of many units, become one unit endowed with thought and volition, and so through him are brought into relation to other Peoples, who are also unified in some kind of an Executive. The latter as individual represents the Nation individualized and distinct from other Nations, and, accordingly, has the first hand in the external affairs of his country.

We have already defined the State psychologically as actualized Will whose end is to will Free-Will through the Law. But this actualized Will (or State) has to be energized and made active through a single personal Will; having set forth the Law as the first part of its process, the State must proceed to execute it, as the second part of its process. Thus the single Will of the Executive must be filled with the universal Will expressed in the Law. Herein we behold the inner dualism of the President and indeed of every Sovereign. He is a Single-Will with all its personal ends, inclinations, ambitions, yet he

must also be All-Will, with its universal end. Such is the inner separation and twofoldness in every ruling Ego from the humblest to the highest.

It has been the great political development of the race to harmonize this inner contradiction in all authority. The American way is to put the President under the Constitution, which prescribes to him what he shall do and how, and what he shall not do. If he violates this Constitution and follows his own arbitrary will, he is impeachable by the Legislature.

We have already noted that the President is an essential element in the total legislative Process, and as such he has his place in the legislative Article (First). But he is not only a part of but is also co-ordinate with the Legislature as a stage or element of the entire governmental Process, which has three such elements, legislative, executive, and judicial. Hence he has an Article of the Constitution all to himself (the Second), being on a par with the National Legislature, though the executive Article is not half so long as the legislative Article. This symmetry was, of course, consciously intended by the framers of the instrument.

The Constitution places the executive Power as second, whereas historically it seems to be first. That is, the father, the patriarch, the chief, the absolute monarch, each is all three Powers in one,

being the lawgiver and judge as well as executor. With time the differentiation takes place, and the inner process of the ruler's Self becomes an outer process of three different powers. In such case the lawgiver grows distinct from the ruler, and makes the law which is to govern. This separation begins to show itself in early Greece at Athens and Sparta. Herein the Jewish lawgiver was different from the Greek; Moses was both monarch and lawgiver, and to these the third element must be added, the divine, of which also he was the representative and the spokesman. But for us the making of the law comes first, in fact it cannot be executed till it is made.

So the executive Power is placed second in our Constitution, being truly the second or separative stage in the total movement of the Constitution. Various external reasons may be alleged for this arrangement, but the fundamental reason is the psychical one, which grounds the executive Power in the very process of the Self which creates it. Primarily it is Will and thus a separation, a putting outside what was inside. Then the President as individual represents his Nation as distinct and separate from other Nations. Thirdly the President is dualized internally into his own personal Will on the one hand and the National Will on the other, the latter of which he represents, and this is what he must execute just through his own personal Will.

We have already noted the outer symmetrical relation of this executive Article to the preceding legislative Article. There is likewise an inner symmetrical order; we shall find that the divisions of the one have an intimate correspondence with those of the other. The present Article we would divide into two portions, the first of which gives the Organization of the Executive Power (First Section), and the second of which gives the Apportionment of Executive Areas (the remaining three Sections). But there is a third portion needed to complete its thought and its movement; just as the Executive requires the other two Powers to finish its process, and thus interlinks with them in the total governmental process of these three Powers.

This inner order of the Article may be designated briefly as follows: —

I. The organization of the Executive Power; the one Person, the Single-Will, is selected by the People, the many Wills, to represent them as concentrated Power, he having the ability to be responsible for what he does, and freely accepting such responsibility (First Section).

II. The Apportionment of Executive Areas; the Constitution grants certain prescribed Areas of Power to the President, who, as Single-Will, is absolute or wholly unlimited in one Area, partially limited (or prohibited) in another Area, finally is wholly limited (or prohibited from all

Areas by impeachment). That is, all his Areas of Power are prescribed by the Constitution to the President, but he has different degrees of Power in different Areas, from absoluteness to nothing.

III. The new Apportionment of new Areas of Executive Power; this is going on continually, as fresh emergencies arise requiring the exercise of the concentrated Will of the Nation in war, rebellion and other exigencies often sudden. Says Chief-Justice Marshall: "This government is one of enumerated powers, but the question respecting the extent of the powers actually granted is perpetually arising, and probably will continue to arise as long as our system shall exist."

The Executive has shown an enormous latent power of extending its Area to meet a great crisis not prepared for explicitly in the Constitution. The President has expressly set the Constitution aside in order to save it (Lincoln), which was a great danger for overcoming a greater danger. It was a disregarding of a part or a special grant in order to preserve the whole—the amputation of a limb for the sake of the entire body. In such a case the People, the original source of the Constitution, must ultimately approve and confirm the act of the President, making it their own.

But such an extreme exercise of the executive Power is necessarily temporary. Still in the

ordinary course of development new Areas are continually rising to be apportioned and assigned to the prescribed limits of the Constitution. This is specially the function of the National Judiciary, to which the Executive must subordinate itself in the regular order of things.

I. ORGANIZATION OF THE EXECUTIVE POWER.

First of all the fact is to be regarded that the Presidency as organized in the Constitution is no longer an *immediate* Will, as that of the Patriarch or the Monarch proper, but is *mediated* wholly through the organic Law of the land. So this kind of executive Power has come after the legislative, since the Constitution and its Laws must go in advance, for they determine the action of the President, or to use a psychological statement, they are what mediates the immediate personal Will of the Executive.

Taking a look at the sweep of the present subject beforehand, we may briefly state the following movement of it, which is to be verified by a close scrutiny of the text: —

1. The Executive Power shall be vested in a self-conscious Person (or a Single-Will) periodically chosen to embody the Will of the People as expressed in the Constitution. The Idea, or Conception of President.

2. This Person (or Single-Will) shall be selected from the People by the People, under conditions herein given, to embody their Will as

expressed in the Constitution. The Idea or Conception of President is now *realized* in a given individual with a given name.

3. This chosen Person shall take an oath or affirm that he as Single-Will is one with the Will of the People as expressed in the Constitution, therein returning to the Idea or Conception of President, and declaring himself conscious of the same, from which fact springs his accountability.

The next thing is to see this process and to make it our own by a careful study of the words of the original.

ARTICLE II. — SECTION 1.

Cl. 1. The Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-president, chosen for the same term, be elected as follows:

Cl. 2. Each State shall appoint in such manner as the legislature thereof may direct, a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

Cl. 3. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The per-

son having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such a majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

Clause 3 has been superseded by the 12th Article of Amendments.

Cl. 4. The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

Cl. 5. No person, except a natural-born citizen or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Cl. 6. In case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of said office, the same shall devolve on the Vice-president; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-president, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

Cl. 7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Cl. 8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

“I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States.”

Though the Second Article as a whole is less than one-half of the length of the First Article (legislative), the First Section of this Second Article is the longest Section in the instrument. It deals in the main with the organization of the Executive, and shows how careful the framers of the Constitution were to affirm, secure and limit the one-man power in the Government. It is made up of eight Sections short and long, each having several items.

In accordance with our way of studying the Constitution, we shall first seek to discover the organizing principle of this Section as an entirety, to find in it the process which created it. We have before us the concentration of the National Will into one intense point, into the Single-Will of the head of the State, here called the President. This Person must be found and selected from the vast mass; the process of such selection is to be set forth with great pre-

cision and at sufficient length — all of which makes up the main body of the present Section. The Person being selected finally takes the oath, in which he pledges himself to the Constitution, promising that he, as Single-Will, intends to be one with the National Will as expressed in the present instrument. More fully, this process is to be unfolded in the expression of the following Clauses, which may be now considered briefly in their given order:—

In *Clause First*, the fundamental note is struck: The Executive Power is to be vested in a Single-Will, “a President of the United-States of America.” The Nation is thus unified; the Will of all is concentrated into the Will of one, the State becomes a Self through the President, who truly *personifies* the State, makes it a Person, endows it with Selfhood. Here we reach down to the ultimate source of ruler, chieftain, King, President: the Nation must be one, a Self, must see and know itself as a Self embodied in a supreme Person. The People in its millions of self-reflecting units (or Egos) must reflect itself in a single unit (or Ego), which is also self-reflecting. The State is indeed not strictly a Person, but must be personalized in order to think and act. I, this Self here belonging to a Nation, have a very deep psychical need: I must see and know this Self of mine as objective in my Nation; indeed, I must make it objective in my

Nation by the election of a President, who is the national Self embodied and made personal, and indeed, visible.

Moreover, this process is to recur periodically; every four years a President is to be elected by the People. Each citizen, then, is to keep up this process of nationalizing himself through repetition; that is, his own Self (or Ego) is to perform at stated periods the act of embodying itself in a presidential Self, who represents, or rather personifies the whole Nation, making it a Person who can act and think.

So we seek to express the psychical ground, which is the ultimate one, of the present Clause, in which we find the President affirmed as the executive Power of the Nation. He is a Single-Will untrammelled in his sphere, he is chosen by the Single-Wills of the People, and this choice must take place periodically. Let us note for a moment this periodicity, this recurrence of the Presidential election, as it is often sorely misunderstood, and often severely censured. It means that each person of the Nation, each citizen, must never lapse in this process of nationalizing himself; at given periods he must recreate himself nationally by a reproduction and fresh embodiment of the National Self in one Person, who is the Single-Will filled with the Will of the Nation. No man can be a living member of a free State who is not repeatedly remaking and

vivifying that State by giving to it a will which is to energize it and make it valid in the world. The Presidential election is, or ought to be, a fresh baptism of all the People in the fountain of nationality.

The method of choosing the President is next given. In *Clause Second* special Electors are prescribed, equal in number to the Senators and Representatives, who, as well as all officers of the Government, are prohibited from being Electors. The purpose is to keep Congress and officialdom from usurping the power of selecting the President. It is the function of the States to appoint these Electors, and in the different States the method of appointment has varied. It is plain that the framers of the Constitution did not intend to leave the election of President to a direct vote of the People; they interposed these Electors, who might be, and often were, chosen by the State legislatures. This is one of the strongest examples in which the Constitutional Convention showed a distrust of the People acting as a mass immediately. The election of the President is, on the one hand, taken away from the National Government at the center, and, on the other hand, from the People at the periphery; it is really given to the Single-State in its legislative body. There is no doubt, however, that the tendency has been to give this power to the People, who now vote for their President in per-

son, having reduced the electoral system of the Constitution to hardly more than a formalism.

How these Electors shall proceed after they have been chosen, is told in *Clause Third*, which, though superseded by the Twelfth Amendment, is worthy of notice. They were actually to choose the President (and Vice-President) and not simply to register the choice of the People. They were to vote for two persons, without naming either of them President or Vice-President. The person having the greatest number of votes, if this be a majority of all the Electors, was to be President; the person having the next greatest number was to be Vice-President. If the Electors did not elect under the given conditions, Congress had the electoral power, as is further stated in the Clause. The defects inherent in such a system soon showed themselves, and led to the adoption of the Twelfth Amendment in 1804. This Amendment also meets the problem inadequately, and has in its most important respect been practically set aside by custom. The Electors still meet and vote by ballot for President and Vice-President, but *not freely*, since the latter have been already chosen by the ballots of the People of the respective States. There was a rumor (we cannot vouch for its truth) that J. R. Lowell, who was elector on the Hayes ticket in 1876, proposed to fall back upon his constitu-

tional right (or perchance duty) and be a free elector once more (*ultimus Romanorum*) by voting for Tilden and thereby preventing a fraudulent election to the Presidency. If he ever had had such an intention, his nerve failed him at the last moment. As the electoral vote stood 184 for Tilden and 185 for Hayes, counting the three contested Southern States for the latter, it is plain that Mr. Lowell centered in himself the power, by one bold masterstroke, to make his political fame far outweigh his poetical, though the latter is not small. This is not saying that he ought to have so voted. But how much American History pivoted on Lowell while he was casting that ballot!

The day for choosing Electors and the day for casting their votes is not settled by the Constitution, but this duty is assigned to Congress in *Clause Fourth*. Some need for changing such days might arise, so they were not fixed in the organic law, which, however, settled that the matter had to be done. In this fact we can see the Constitution asserting itself as the fixed, permanent element amid the changeful necessities of external circumstances, which it is the function of Congress, being also changeful, to meet with appropriate legislation.

The qualifications for the Presidency are given in *Clause Fifth* which shows the most decided and indeed the only real touch of Nativism in the

whole Constitution. The foreign-born citizen cannot be elected President; surely no great discrimination when the same rule of exclusion holds practically true of many millions of "natural born" citizens. Even to this rule there is an exception stated in the Clause, doubtless made out of respect for distinguished foreign-born members of the Convention, notably Hamilton, Wilson, Robert Morris, to whom the Convention here makes this bow of courteous recognition. Very appropriate will the little act of courtesy turn out, for one of these foreign-born citizens, Alexander Hamilton, will produce in *The Federalist* the best exposition of the Constitution that has ever been made in a book, being still the classic work on this subject.

The Presidency is thus legally attainable by every native citizen of the country, who has now a career open to him according to his ability. In every American lies the total gamut of social and political possibilities "from gallows to the Presidency", as has been said. To be sure, the government is not paternal; on the contrary it is exceedingly trying, most trying perhaps of all kinds of government to the man without manhood, without the power of self-determination. The complaint has been loudly proclaimed that the Russian Jew, for instance, fleeing to America, simply passes from one kind of tyranny into another, from the Tsar's despotism into that of

the sweat-shop. America furnishes the greatest opportunity, but cannot furnish the ability to seize it. The State secures Free-Will supremely, but the immigrant must bring it along, or some degree of it. From this point of view a free country is the most exacting of all countries, making the highest demands upon its citizens, whom it treats as men able to help themselves, not as children who are to be helped to get their living. The paternal government of the Orient is certainly not established here, and cannot be; free institutions presuppose the free man; the unfree man will make himself unfree anywhere by finding a master.

The President may die or become incapacitated during his term of office; the same may happen to the Vice-President who has been elected with him. Hence the question of succession rises, which is the subject of *Clause Sixth*, and which, if both President and Vice-President cannot serve, is regulated by Congress. The order of birth settles the succession in Monarchies; nature, not man, determines who the ruler shall be. Complete self-government requires that the People select their Monarch, who thus is put over them by themselves, and not from an external source. A constitutional Monarchy is really a contradiction, which has to be overcome by a country substantially doing away with its Monarch (as in England), or substantially doing

away with its Constitution (as in Germany, especially under Bismarck). The American Constitution refuses to let outside physical causes select its ruler through birth and death, not permitting tenure for life or succession by blood. Thus the People *mediate* their one-man power, by no means abolishing it, but rather increasing it, since it is truly their own, and is not put upon them by nature. Elected for a stated term is the President, who takes the place of the King born to reign for life — a great step in the evolution of the Executive Power of the modern State. Of course the President may die or be incapacitated during his term of office, hence the succession must be legally settled, as it is in the present Clause.

Thus the American Government moves in regular periods determined by its own organic Law, and not in irregular reigns determined by the Fates of Birth and Death. The Nation and not Nature selects the ruler and puts him into his periodical orbit. The President does not rule “by the Grace of God” in the old sense, but in an entirely new sense, for the Divine Order is certainly not wanting in the Constitution of the United States.

That the President is to receive pay for his service is declared in *Clause Seventh*, and is in accord with the rest of the Constitution which allows properly no unpaid servants in the State.

This harmonizes with the spirit of the modern world, and makes democracy possible. It is aristocracy which pretends to govern for the honor of the thing, but it does not fail to look after the interests of its class. The President has to work for hire, as does the common laborer who votes for him. It is strange that Benjamin Franklin in the Convention maintained that the Presidential office should be unsalaried, and administered simply for the glory of the place.

It is also provided that the President's salary "shall neither be increased nor diminished" during his term of office. Thus he is rendered fairly secure against the hostility of Congress and perchance its temptation, as it cannot cut down nor add to his stipend. And he is not to receive any other emolument for his service. Such is the attempt to keep corruption out of the highest place in the government.

In the *Eighth Clause*, which is the last of the Section, the President is required to take, on entering upon his official duties, an oath which is here given. It is composed essentially of two items: "I will faithfully execute the office of President of the United States," namely, the special duties herein prescribed, and also, "I will, to the best of my ability, preserve, protect and defend the Constitution of the United States," this being the great general duty of the President, including and overarching all others,

and sometimes absorbing or setting aside the particular constitutional functions of other departments. Here we may find the ground of President Lincoln's statement that he had to violate the Constitution in order to save it — violate it in a part or specially in order to save it as a Whole.

The oath is usually deemed to have a religious element, calling God to witness the promise and to punish its infraction. But no such element is here mentioned, whatever may be implied, and the Chief Justice administers the oath, which rite in England is performed by the chief religious functionary, the Archbishop of Canterbury, at the coronation of a king. As far as we are aware, it is custom which has introduced the taking hold of a Bible by the President at his inauguration.

The meaning of the oath is that the elected President with great solemnity affirms before the whole People that his personal Self is one with the national Self, that his individual Will has as its supreme end and content, the Will of the People as expressed in the Constitution. Thus he is truly a constitutional ruler, as is no other kind of sovereign, if these terms may be permitted in reference to him; he abjures all private plans and purposes inconsistent with the fulfillment of his office.

Herewith the organization of the Presidency has rounded itself out to a completed process,

which brings to a conclusion this First Section of Article Second. Grasping it all together we may observe in it the following movement: —

1st. The executive Power is vested in a single personal Will, which concentrates within itself the National Will, or rather the Nation as a Will, and which is to be selected by the People from the People *periodically*, in order to keep the nationalizing process alive in every citizen (Clause First).

2nd. This Single-Will is to be separated and selected from the vast mass of Single-Wills comprising the People, who are ultimately to perform the act themselves, after the order here prescribed, which also states the requisite qualifications of the person to be elected, and provides for certain contingencies (Clause Second to Seventh, inclusive). It should be added that this selection presupposes a previous selection of several persons through Political Parties, representing different policies of administering the government.

3rd. The Single-Will, having been selected, is now made to return to its conscious Self and to affirm under oath its unity and harmony with the Constitution, which is the Nation consciously expressing its Will in writing. Thus the conscious Will of the President is to unite with and carry out the conscious Will of the Nation.

In this Section, then, we note a distinct psychical process which is the essence of the whole

matter. The Constitution originates the conception of the Presidency which lies primarily in the Single-Will; then this is to be selected and thereby realized and made objective in a Person, who consciously goes back to and unifies himself with the Constitution which originates the Presidency and so originates himself as President.

The Constitution having thus created the Presidency, given the method of selecting the incumbent, and made him aware of his responsibility, proceeds next to tell what he has to do.

II. THE APPORTIONMENT OF EXECUTIVE AREAS. To this subject is devoted the rest of the Second (Executive) Article, consisting of three Sections, which, however, taken together, do not contain half as much matter as the preceding (First) Section. It is evident that the organization of the Presidency was deemed of special importance.

In this portion of the Article we see the Areas assigned to the President and also prohibited, though the latter fact is not so directly expressed as in the legislative Article. Still the prohibitions (here upon the Executive) are present and must be taken into the account. The movement in these three Sections is from the President as absolute and unlimited through various limitations to the President absolutely prohibited (impeachment).

First of all we are to keep in mind that the Constitution apportions and designates these

various Areas in which the President is endowed by this same Constitution with various degrees of Power. He is granted a limited Area, but within that limited Area his Power may be quite unlimited, or also limited. Behind everything lies the constitutional grant of Power, which, however, is of three main gradations, as follows :—

1st. Power absolutely granted within a designated Area, as commander-in-chief.

2nd. Power partially granted and by implication partially prohibited, as the powers exercised conjointly with Senate and with Congress.

3rd. Power absolutely prohibited by Congress under certain circumstances. Impeachability of the President, who thus may be made to pass from absolute power to nothingness.

Here then we have the prohibition in this Article — not of the Single-State or of Congress, as in the previous Article — but of the Single-Will of the President in its total circuit. Still the result is not destruction of the Presidency, for the Constitution provides for the successor who has all the powers of the President and is sworn to exercise them. Hence this extreme negative act to the absolute Single-Will of the Executive calls forth another Single-Will just as absolute.

We should note again a kind of double apportionment in this part: To each apportioned Area of power is apportioned a certain degree or kind of power within that Area.

ARTICLE II. — SECTION 2.

Cl. 1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

Cl. 2. He shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments.

Cl. 3. The President shall have power to fill up all vacancies, that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

The present Section (Second) passes to declaring the powers of the President, and hence might start with the caption: The President shall have power. Thus it would suggest verbally the corresponding division of the legislative Article (see Art. I, Sec. 8), which begins: "Congress shall have power," and then goes on to itemize the details. Quite similar is the procedure here, barring that first sentence.

Clause First deals with the power of the President as absolute; it describes the Area in which

he is truly the Single-Will untrammelled, the one-man power. This Area is indeed limited on all sides, but within it the executive Will is not limited, for it is the National Will embodied or rather *personified*. In this Clause three distinct items are set forth.

(a) The President is commander-in-chief of the army and navy; he is thereby endowed with the physical might of the Nation, which is put directly under the control of his Will. This is not saying that he is not accountable for his use of such strength. He is still a responsible Person, though he act with all the muscle of the People at his command, having all their bodies organized and concentrated into one massive Body, whose force he directs by his Single-Will. In this relation he is the national Giant, or, rather, the Nation as one colossal Giant whose mighty limbs he moves unto his end. To be sure that end must be constitutional, not merely personal; it must be prescribed ultimately by the Nation, by the All-Will which now executes itself in the only way possible, namely, through a commanding Single-Will. The Oriental despot has no such constitutional content in his Will, which is purely personal and absolute; he has no organic law prescribed to him, but he prescribes the law; even if he be said to fulfill the national Will, the latter wills itself to be his Single-Will immediately. The European monarch shows

many varieties, but in general he is in a conflict between these two elements, the personal and the absolute; his problem is, shall I be determined by the national Will and its Law, or determine the same? The American President has really no such problem; his Single-Will is in form as absolute as that of an Oriental ruler, but its end, content, scope, is absolutely prescribed by the Constitution. He is a return to the Orient in the absoluteness of his Single-Will, but just this is what expresses the absoluteness of the National Will, or the complete self-government of the People, whose final absolute command as declared in the Constitution the President is to fulfill. So it comes that he must be endowed with the entire national force in externalizing and executing the National Will; otherwise the government must be without force, veritably Will-less — unable to assert itself among other States. When the Nation has to strike, it has to gather itself up into a Single-Will, into which it must pour all its energy and strength. A free government can thereby become a strong government and the supposed contradiction between liberty and power can be reconciled.

(b) In the same Clause it is stated that the President “may require the opinion” of the chief officer in each of the executive departments — he may or may not, just as he pleases. The wording shows that his cabinet is not to con-

trol him; it is an advisory body in the present instance, not a directory with concurrent authority. Here again we observe that the Single-Will of the President is strongly affirmed by the Constitution, whereby the unity and responsibility of the governmental head are not jeopardized. The Constitutional Convention would not even establish a Cabinet for the President, though the matter was before it and strongly urged. The present allusion to "the principal officer in each of the departments" is no command, and is substantially all that the Constitution contains on the subject. The President is to be unhampered within as well as without, in his external control as well as in his internal decision. A divided authority means a divided responsibility and hence no responsibility, with resulting weakness and irresolution when prompt action is needed.

(c) The pardoning Power is given to the President, being the third item of this Clause, and is derived from the absoluteness of the Single-Will as executive. For the President is endowed with the power to set aside the entire process of the Law in its special application. He can grant a reprieve, which is a temporary suspension of a judicial sentence; but he can also grant a pardon, which is a full release from the penalty of the Law as decreed by the legislative and judicial Powers. Thus he, in the absoluteness of his Sin-

gle-Will, can negative both the Legislature and Judiciary in the single case. He cannot repeal the Law, but he can countervail its effect. The Law which he, as a part of the Law-enacting Process, has vetoed, but which has been passed over his veto and even judicially applied, he can still reach as absolute Executive and relieve the condemned person from its operation. Thus the President in a sense is placed above not only the Law-enacting Process, of which he is a legislative constituent, but also above the Law-completing Process in which the Judiciary sanctions and makes constitutional the Law enacted by the Legislature.

What is the ground of such an absolute power in the Executive? Sometimes the Law in its universality may do injustice to the individual, through mistaking his motives and circumstances, and through not knowing facts which come to light after judgment. So there should be a power of pardon for correcting injustice, also a power of forgiving the guilty under certain conditions, still further a power of amnesty, of suspending punishment for the general good.

The psychical element of the pardoning Power lies in the relation of Self to Self; that is, the Executive as Self, representing the Nation's Self, looks into the heart of the offender, who is also a Self, and seeks to find what is there, bringing it to a new trial and judging it by a

new Law, which is drawn from the depths of the spirit itself. Thus the President, from being the embodiment of the Nation's crushing strength turned outward to destroy the enemy or the offender, now turns inward to the latter's selfhood (which is in essence his own), and regarding it sympathetically with a look of mercy, forgives it and sets it free out of his own absolute Will. Herein he re-enacts the entire process of the Law internally within himself, and puts it aside in the special case.

This last may be deemed the supreme act of the executive Single-Will as absolute, focusing in itself the total governmental Process, though its outward manifestation of power (in army and navy for instance) is more striking for the senses.

From the absolute Powers of the President we pass, in *Clause Second*, to his contingent Powers in connection with the Senate, which body we have already noticed as participating strongly in the executive element. The latter thereby becomes twofold, though the President still has the initiative. These Powers are the following:—

(a) The treaty-making Power, which requires, however, the concurrence of two-thirds of the Senate voicing the Single-States, as they must share in the obligation.

(b) The appointing Power, which the President does not exercise absolutely, but “by and

with the advice of the Senate.” Here the question of Civil Service enters, which has had a long and somewhat varied history. For at this point partisanship makes itself felt most effectively. The President belongs to, and is elected by, a Political Party, which presses its claims upon him. The result is, government is in danger of being administered not for the whole People but for a part, which is the party of the President. The Constitution does not openly recognize Political Parties, though it in many places seeks to guard against their abuses. Whether Political Parties, which are now extra-constitutional, should be taken into the Constitution and therein assigned to a field of operations, being restricted and ordered by the organic Law, is a problem in the future development of government. Certain Single-States have begun to recognize Political Parties, and to subject their workings, in part at least, to legal control.

We note, at the end of this Clause, a limitation put upon the appointing Power of the President: “Congress may vest the appointment of such inferior officers as they think proper” in whom they think proper. What are “inferior officers,” and who is to determine such a status? Evidently this whole proviso leaves a loophole for the usurpation of Congress, which the Constitution in other places has been careful to guard against.

Nothing is said in the Constitution about the power of removal from office. A very serious omission, especially in a government worked by Political Parties, one of which is always seeking to put the other out. It might be supposed that the consent of the Senate would be as necessary for removal as for appointment. Such was the opinion of some of the framers of the Constitution, as Hamilton and Madison. But the thing has gone otherwise. In 1789, Congress gave the power of removal to the President, who was George Washington. In 1867, by the Tenure of Office Act, Congress took away the right of removal from the President, who was Andrew Johnson. In 1887 the Tenure of Office Act was repealed by Congress, so that this matter now stands where it did in 1789. We may conclude, therefore, that time has vindicated for the President the single and absolute power of removal, while his power of appointment is contingent and double, being conjoined with approval by the Senate.

As the Senate, however, takes recesses while the Government has to go on continuously, *Clause Third* gives to the President the absolute power to fill temporarily vacancies which may happen during these recesses.

In this Section (the second of the Executive Article) we find the grants of the Presidential power as absolute (First Clause), as conditional

upon the Senate (Second Clause), and as sometimes the one and sometimes the other, in cases of removal from office and of vacancies (Second and Third Clauses).

But in the next Section (the Third) we find that the contingent element is not simply the Senate, but the two Houses of Congress, and so is in a measure doubled.

ARTICLE II. — SECTION 3.

Cl. 1. He shall, from time to time, give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

This Section (Third) contains a variety of materials, chief of which is the relation of the Executive to Congress.

(a) The so-called Presidential Message is first indicated, in which the President gives to Congress “information of the state of the Union,” as this is the great end of the governmental process, and as something may have happened during the recess of Congress. The Executive Power, being continuous and always at the center, ought to know any emergency. Also

the President is to "recommend such measures as he shall judge necessary and expedient;" in this lies a kind of legislative initiative which we have already noticed. He cannot directly introduce a bill into Congress though he has the right to suggest the contents of one which he may deem "necessary and expedient."

(b) To this kind of initiative is added another kind: "he may, on extraordinary occasions, convene both Houses, or either of them;" to this again is conjoined a conditional power of adjourning Congress "to such a time as he shall think proper." Again we behold within a prescribed constitutional sphere the absolute Single Will of the President, who, as the one ultimate Will-power in the government, has to take the initiative under certain conditions and in certain emergencies.

So in relation to Congress, as previously in relation to the Senate, the President has his field of the absoluteness of one-man power, which field is indeed small, but capable of being enlarged under the pressure of events.

(c) Since the President as individual represents the Nation as individual in relation to other individual Nations, he is to receive their representatives, "ambassadors and other public ministers." Thus we are suddenly whirled in this Clause from his internal to his external relations.

(*d*). Two more sentences require of the President that "he shall take care that the laws be faithfully executed," and that he "shall commission all the officers of the United States." Both these injunctions seem to be superfluous. The first is essentially a repetition (see oath above). The second follows of itself from his office, and is hence surplusage. The Committee on Style here took a nap. The extraordinary condensation and symmetry of the Constitution suffer a momentary lapse. In our judgment this is rather the weakest spot in the instrument as a composition. The matter, however, appears to be wholly innocuous.

Herewith we have reached a very important Clause, that which provides for the impeachment of the Executive, of him who is the Will of the Nation, representing its power and majesty. Upon this subject we may premise a few words before taking up the Clause specially.

The President must be impeachable in order to be responsible. He is sworn to "preserve, protect and defend the Constitution of the United States," of course, as he understands it; but is there no ultimate appeal from his judgment, not only in legal but also in political matters? The great peculiar fact of the Presidency, in distinction from any Monarchy that ever existed, is that the President, endowed to a degree with an absoluteness of power greater than most Monarchs

by the Constitution, is nevertheless held accountable for the exercise of his power by that same Constitution. Thus the ruler is for the first time put under the organic Law of the State without obliterating him as ruler.

Impeachability presupposes the one personal Will, chosen for its ability and its responsibility (which a royal birth does not necessarily give), and made absolute within a certain sphere by the Constitution, yet limited or working conjointly with other Powers in still different spheres. What is to hinder the President, being endowed with absoluteness in the one case, from employing it in the other case? The fact that he can be impeached and deposed from his office. He commands the army absolutely, but he cannot use it to arrest a member of Congress for words used in debate. He can appoint an ambassador, but cannot install him without the confirmation of the Senate. If he were absolute in all cases he would not be accountable, for he would be everything; if he were limited in all cases he would not be accountable, for he would be zero. These two extremes may be in a general way, if not exactly, represented by the Tsar of Russia on the one hand, and by the King of England on the other; the Tsar is absolute without accountability, and the King is limited without accountability. Now the President is both and neither. He is abso-

lute in a sphere, he is limited in a sphere, both constitutionally; but if he uses his absolute power in the one field to break down the limits of the other field, he violates the Constitution, and can be held accountable by impeachment, which is not the case with either Tsar or King, both of whom are not accountable politically, though for opposite reasons.

It is evident that the impeachability of the President is a very important constituent of the total executive principle. Really it is a deeply necessary stage of what we may call the process of the President, since by it he can be brought back to himself as a Single-Will acting through its own power and held accountable for its deeds.

The President is not alone impeachable, the Vice-President is also, as well as every civil officer of the United States. Individual responsibility belongs to every person in office, who likewise is sworn on his own account to obey the Constitution. The sweep of impeachability is expressed in the following Section, which is the last of the executive Article, and is composed of only one Clause:—

ARTICLE II. — SECTION 4.

The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors.

It is manifest that the idea of the impeachability of high officers of Government had made a deep impression upon members of the Constitutional Convention. In fact they were compelled to pay attention to it by what was going on contemporaneously in England. The impeachment of Warren Hastings as Governor General of India was the great political fact discussed by the English-speaking public all over the world. The trial, begun the year before, was still proceeding in 1787, the year of the Convention. Some of the greatest constitutional lawyers and orators that Great Britain ever produced, headed by Edmund Burke, took part in the trial against Hastings, and had discussed the nature and purpose of impeachment in a free government with great fullness and marvelous eloquence. The conception of making the highest officials of government responsible was mightily intensified by that great object-lesson. (Read the stirring description in Macaulay's famous Essay on *Warren Hastings*.)

The result is that impeachment in thought and word pops up repeatedly in the course of the Constitution, and sometimes rather subtly and unexpectedly. When the President shall be impeached, the Chief-Justice is to preside in the Senate and not the Vice-President who is in line of succession (Art. I., Sec. 3, Cl. 6). The trial of all crimes shall be by jury except in

cases of impeachment (Art. III., Sec. 2, Cl. 3), and in the present Article, the exception to the President's pardoning Power is "in cases of impeachment" (Sec. 2, Cl. 1). A reason can be found for these and other provisos on the present subject. Yet they lie under the surface, showing that there was a continuous undercurrent of thought in the Convention just along this line. Certainly more important and obvious constitutional matters are left unmentioned in the instrument (see Bryce, *American Commonwealth*, I., p. 322, Third Ed., for some of these omissions, which might be indefinitely increased). No less than ten different items, provisos and allusions pertaining to impeachments spring up in the course of the Constitution (see them listed in the appendix to G. T. Curtis' *Constitutional History*, II., p. 626, new ed.). Moreover, we note the careful organization of the impeachment process, with brief yet precise limitations of its sphere.

Undoubtedly the idea of impeachment as well as the procedure of it are derived from the English Constitution. But the latter stops short at the very issue; it does not make the King impeachable, inasmuch as "he can do no wrong." Thus the ultimate point of personal responsibility for government is left out. The American Constitution adds just this point, really the most important of all, and thereby

takes the great step across the Ocean out of Europe into the Occident. Giving the President power and then holding him responsible for it constitute together one of the chief facts in the political movement of the world as it passes from the Oriental, through the European to the Occidental or American State.

The framers of the Constitution seem to have expected that there would be more use made of impeachment than there has been. For the first hundred years only six cases are recorded, besides that of Senator Blount, who as Senator was not impeachable. It is too mighty an implement to be employed except on extraordinary occasions. James Madison, voicing doubtless a common opinion at the time of the formation of the Constitution, said: "The wanton removal of meritorious officers would subject him (the President) to impeachment and removal from his high trust." No such ground of impeachment would be regarded as valid now or for long since; if it were, every President since Andrew Jackson ought to have been impeached — some of them many times, not to speak of thousands of other officials equally liable.

There is some reason for the objection that the Senate is not always the most impartial judge in the case of impeachment. For instance, the Senate tried President Johnson for disobeying one of its own enactments (Tenure of Office Act).

It refused to concur in the President's suspension of Secretary Stanton, who was re-instated and then removed again by the President who was thereupon impeached by the House and judged by the Senate which thus sat on its own case. There is a protection, however, in the required two-thirds majority for conviction, and this is what saved Johnson by one vote from deposition.

It might be thought that the Supreme Court would be the better tribunal for trying impeachments. But to this arrangement there are serious objections, one of which is that the Supreme Judges are also impeachable as well as the Executive and his officials. But members of Congress are not impeachable, each House having the right to punish its own members. So the two Houses have to form the Court of Impeachment, one as prosecutor, and the other as judge.

We have now gone through the second division of the present (executive) Article, which division is made up of the last three Sections, and contains what we have called the Apportionment of Executive Areas. The latter are marked out and assigned by the Constitution, yet show in themselves three stages or gradations, from absoluteness of power, through partially limited and partially prohibited powers, to a final prohibition of all power in the Executive through deposition from office. This seems for the moment to obliterate the Presidency, since we

pass from the President as absolute to Congress as absolute, seeing that the latter reverses all his grants of power, limited and unlimited, and sweeps away all his areas of authority.

But the Presidency persists through all this negative work and immediately appears again in the successor who is prescribed by the Constitution, which of itself through its own machinery elects a new President having all the constitutional powers of the old one. Thus the process begins over again; the President has all his former Areas, but is held responsible for his use of them. But Congress is not to usurp them. So we have come back again to the established Apportionment of executive Power as settled by the Constitution.

But fresh contingencies arise calling for national action; new powers must be asserted to meet a sudden emergency. So we come to our third division.

III. THE NEW APPORTIONMENT OF EXECUTIVE AREAS. Already in other connections a number of cases have been cited, in which there was a necessary though unconstitutional exercise of executive Power. Indeed in the sovereign Single-Will such a discretionary use of latent energy is always lodged. In none other of its departments is government embodied in a person who can act on the spot, if need be; the National Will is *personalized* in the President just for any emer-

gency. The result is, the executive Power is the most elastic of all three, and can be stretched to cover almost any Area temporarily. The President too, like all executives, has sometimes to act under an old law: *Salus populi suprema lex.*

1. The legislative function is the first to be curtailed by the Executive in the interest of action. The Legislature is a deliberative body, and is composed of many persons; the Executive is one Person, and is always ready to exercise his Will. Usually in a crisis the Legislature surrenders a part of its powers, acknowledging its own incompetency. Especially is this the case with us if Congress has confidence in the President. Lincoln assumed what legislative functions he needed, and Congress was ready to back him; but when Johnson came to the helm and wished to employ Lincoln's powers, he was thwarted and finally impeached by Congress. Thus the Executive passed in a very short period from its widest to its smallest area of power.

2. History has recorded a good deal of struggle between the Executive and the Judiciary. There was the old conflict between Marshall and Jefferson, then between the Supreme Court and Jackson, and in the Civil War between Lincoln and Taney. In all these cases the Judiciary sought to apportion the Executive Areas according to its interpretation; Jackson

specially claimed the right of the Executive to interpret the Constitution as he understood it. Here was a conflict between two sources of interpretation, the Executive and the Judiciary, both having been sworn to obey the Constitution, which each side looked at in a different way.

Undoubtedly there are two methods of regarding the Constitution. The one insists upon the special Clause, the special grant or prohibition; this is peculiarly the judicial and indeed legal attitude. The other looks to the general object of the whole instrument, and subordinates the special proviso to this general object; such may be the attitude of the Executive and certainly was the attitude of Lincoln during the war. The part is valid as long as it does not contradict the purpose of the whole. The Chief-Justice (Taney) in the *Merryman* case took the purely legal point of view and based his decision on the special Clause, while Lincoln (the case pertained to the suspension of *Habeas Corpus*) asserted the universal scope and end of the entire Constitution as the ground of his action. Thus the two interpreters, the heads of the co-ordinate Powers, executive and judicial, collided in this matter of assigning Executive Areas.

It cannot be denied that in such a case the President makes himself the Supreme Judge and administers the law according to his own interpretation of constitutional powers. For the

sake of the one great general end of the Constitution (say the Union) he disregards some particular Clause which may possibly be brought into conflict with that end. But it is understood that such an exercise of power is to meet a temporary emergency which threatens the whole State.

3. The President, having made himself Supreme Judge of what he is to do, and having done it, must, in the end, have this deed brought under the cognizance of the Supreme Judiciary of the land, otherwise he has permanently usurped this whole element of the governmental process. For the latter requires that every act of executive Power and its officials be adjudged consistent or not with the Constitution *objectively*, and not merely subjectively, in the mind of the acting official. So it comes that another and differently trained Ego, the Judge, whose sole function is to bring the act of the individual to the test of the Constitution after it is done, appears in the government and asserts his place. The Executive judges and then acts, which act, however, in a constitutional State, is still to be adjudged according to the organic law by a power constituted for this very purpose. The highest and humblest in the State, the President and the private man, are both to have their actions at *law* finally adjudged to be constitutional or not by an independent Supreme Judiciary.

Thus the Executive Power may be said to have called forth the Judicial Power to justify itself, for otherwise it would be subjective and arbitrary, in appearance at least. The Single-Will of the President, having exerted itself within its Area, submits itself in its deed to judgment, and thus passes over into the Judiciary, which is now the supreme determinant of the Executive, bringing back his act to the Constitution. This is the third stage of the complete governmental process, which we shall now look at more fully.

III. THE JUDICIAL POWER.

A separate and an entire Article of the Constitution is given to the Judicial Power of Government, thus hinting its equality and co-ordination with the other two Powers, Legislative and Executive, each of which is honored with an Article in the order of the instrument.

Still it should be observed that the Executive Article is fully three times as long, and the Legislative Article is more than six times as long as this Judicial Article. Such a difference in the quantity of matter suggests a difference in the elaboration of details, though the correspondence may not hold true with absolute precision.

We have a right to infer, from this and other reasons, that the judicial branch of government is the least developed of all three in the Constitution, and that such immaturity belonged to the

time. In England the Judiciary was not constitutionally free, but was practically an appendage of Parliament. In some of the Colonies it was asserting itself as a co-ordinate branch of government. Theoretically its independence had been affirmed by Montesquieu and others. Conceived already it has been, but in the Constitution of the United States the Judicial Power in its full majesty is for the first time born into the world.

Still it is there somewhat of an infant, and has yet to grow. It is the weakest, most immature of the three Powers, but through the long fostering care of one of the world's great men, John Marshall, it will unfold to its full stature, quite equal to the other Powers. All can now see that Marshall in his decisions fought and won the battle for the Union legally long before it was fought and won by arms. A result is that since the Civil War Marshall's fame has been steadily increasing, while that of his great antagonist, Thomas Jefferson, seems to be declining. The independence of the Chief Justice was secured constitutionally by his life-tenure, and perchance also by his fixed salary, so that he could live and persist in his position in spite of the hostility of Presidents and Congresses. For nearly thirty-five years he continued to build up the edifice of the Judicial Power, till it became the most original and the most generally approved part of our

government. Foreigners often admire the Supreme Court when they admire nothing else about our State.

The Judicial Power is the third in the three-fold order of Government. This fact is not an accident, but lies deep in the nature of the Judiciary which has to return to the Legislative Power and take the latter's Law, construing and applying the same to the special case. The judge has his legislative element; he does not primarily enact the Law, but in a sense re-enacts it, making it truly live and bringing it home to its end in the individual. Thus the Judicial Power may be deemed the third stage in the psychical process of a complete government.

The foregoing fact becomes more manifest and explicit when we consider the highest function of the Supreme Court. This is its power to decide a Law of Congress to be unconstitutional. Such is truly what makes it a Supreme Court, and an independent yet co-ordinate element in government. It takes the act of the National Legislature and affirms or denies its congruence with the Constitution, which is the common source of itself and of the legislative Power. Thus it has become an equal and integral part of the governmental process, completing the Law which has been enacted by both the Legislature and the Executive. We may say that Congress passes the Law, the President affirms it, and the Judi-

ciary completes it, rounding it out, as it were, to its final validity.

The Supreme Court is composed of a number of Persons, and is a kind of deliberative body sitting in judgment, a species of Congress, not Law-enacting but Law-completing. It is not, therefore, concentrated in a Single-Will like the President, but is a return to the multiplicity of Congress though much less in numbers than either House. This fact is suggestive inasmuch as the Supreme Court in its structure as well as in its formal procedure recalls the legislative body, having its quorum of judges, its deliberation and discussion over the decision, and its final vote upon the decision which requires a majority to make it authoritative. Thus by a kind of legislative procedure it may be said to re-enact the Law which comes before it as applied to the special case. Still we are to note the difference between legislation and adjudication: the first is to bring the Law out of the particular to the universal, while the latter is to bring the Law back from the universal to the particular. Congress is to make the personal case impersonal in the Law, the Court is to make the impersonal Law personal in the individual case. Each branch has its own sphere of activity, yet they both are parts of one process. The Judiciary brings the law down to the Person, yet at the same time carries it up to its original source in the Constitution.

Thus the Supreme Court, independent and freed from all partisanship, has to declare whether the legislative enactment is in agreement with the end of the State as expressed in the Constitution, which end is to secure Free-Will through the Law. Such is the idea of pure Justice in its universality which the Supreme Judge has always to have before him, and which is to govern him in his decisions. He brings back the enacted Law to its primal source, measuring and declaring its value according to that highest standard.

Still this Law, in order to be brought before the Supreme Court, has to be embodied in a deed which constitutes the particular case to be adjudicated. The Law, as such, the judge does not pronounce upon apart from an individual action. That is, the abstract Law must manifest itself concretely in a human deed, which may be then brought before the Court. It must become Will and be executed, nay it may be just the Will of the Executive, which is summoned to the judgment-seat. Thus Law has to be individualized in an act of Will in order to be a subject for adjudication, which is the work of the Intellect. The Supreme Judge subsumes the deed under the Supreme Law, which is ultimately the Constitution, and is the genetic source of all lesser positive Laws. But even the Constitution has its end, as we have often seen, in the securing of Free-Will, which Free-Will manifests itself in the deed.

Psychically, then, the Judicial Power is Intellect, is the work of Judgment which brings back the particular act of Will to its universal creative source, and declares in the decision the subsumption of one under the other, or the opposite. On the other hand we have already seen the Executive Power to be Will, in fact, a Single-Will. Thus in the governmental process we behold both Will and Intellect represented, or, rather, actualized, whereby the inner process of the Ego (the Psychosis) is seen to be the generative and hence the ordering principle of government.

The Supreme Court has been careful to limit itself within its own field and to keep from trespassing on other departments of Government. (1) It cannot prescribe the law to the legislative branch, nor can it repeal an enacted law. Even where it decides a law to be unconstitutional, it has itself declared that such a decision does not repeal the law. (2) It can neither prescribe nor forbid executive action; it will not interfere in matters strictly political and not judicial. It will not say to the President whom he shall appoint, or what shall be the policy of his administration. (3) It will not decide what is not before it; for instance, a law may be unconstitutional, and may be obeyed for many years; the Supreme Court has nothing to say about it, till the special case comes before the Court involving

the constitutionality of the law. The Supreme Court once refused to declare even to George Washington its opinion on a matter which was not before it in a special case.

All of which means that the Judiciary presupposes the Law and hence the Legislature, also presupposes the executive act in advance of its own, so that it (the Judiciary) can return upon those two Powers, and in the single case adjudge both by the Constitution. Thus it is the third Power in the complete governmental process, carrying not only the enacted Law back to the constitutional sources, but also the individual Will of the citizen which may have been violated by that enacted Law.

The Judicial Power, as given in the Constitution, has its own inner process which is also three-fold, and corresponds to the division of each of the previous Powers, the legislative and the executive. This symmetrical order in the movement of every one of the first three Articles, which constitute the second general division of the Constitution, is to be noticed by the reader, as it is one of the more hidden sources of the harmonious impression produced by study of this instrument. The present Article we would divide, as in case of the previous Articles, into two divisions primarily: the Organization of the Judicial Power, then the Apportionment of Judicial Areas. To this a third division, not directly mentioned

in the Constitution, must be added to complete the process. The outline is as follows: —

I. The Organization of the Judicial Power; the Executive appoints and the Senate is to confirm a body of Judges, whose supreme function is to test the work of both the executive and legislative Powers by the Constitution. The conception or originative idea of the Supreme Court is that of judicial sovereignty in interpreting and declaring the organic Law, herein being ultimately supreme over both the other Powers (Section First).

II. The Apportionment of Judicial Areas; the Constitution prescribes certain Areas of jurisdiction to the national courts and to the Supreme Court; also within these areas it designates different kinds of jurisdiction, as original and appellate. So the material is divided up and arranged which is brought to the courts (Sections Second and Third).

III. The new Apportionment of Areas which are continually rising; not merely new questions come up, but new powers have to be asserted. New materials are always being ground out by the old machine, yet the machine also has to be renewed, in fact has to be always renewing itself. The post-constitutional development of the Judiciary was greater and more complete during Marshall's time than either of the other two branches of government. During Lincoln's time the Executive developed for the emergency of war an

enormous increase of power, which, however, fell back into its old channel after the crisis had passed. But the Supreme Court has essentially retained possession of its judicial Areas won chiefly by Marshall and his associates. The one-man power of the Nation, having exerted itself supremely and as supreme in the hour of need, again subordinates itself to Law and Constitution as interpreted by the Supreme Court.

It should be added that the Judicial Power shares in both the other Powers. It has a legislative element, as already noted, in its interpretation of the Law. It has also an executive element in its own organization, having its marshal and his little army for enforcing its commands. Each Power is in itself threefold while being one of three; each is a part of the whole process of government by having that process as its own internally. This internal process of the Judicial Power we shall now examine more fully.

I. ORGANIZATION OF THE JUDICIAL POWER. — Externally we first note that the organizing Section of the Judicial Power is very briefly set forth in one short Clause, while the organizing Section of the Executive Power is a very long one, the longest Section in the Constitution. The one-man Power must be carefully defined on every side, that it be prohibited from encroaching upon other departments, and protected in turn from their encroachment. The organization

of the Legislative Power with its two Houses and its double relation to the United States and to the Single-State, is a far more complicated matter than the organization of the Judiciary, which is, accordingly, dispatched with striking brevity. Moreover the chief part of its organization is explicitly handed over to Congress by the Constitution.

The Legislature is usually regarded as the source of the Judicial Power. The English Parliament was originally the Supreme Judge, and still is legally; but its judicial functions have been separated from its legislative and assigned to persons specially trained in the law, Hence the Constitution in giving the main work of the organization of the Supreme Court to Congress, simply re-enacted its origin, referring the child back to its parent for further assistance in its development toward independence. Moreover, in the threefold psychical process, as already noted, the Judiciary is essentially a return to the Legislature, whose law is its material, its very food, without which it would have nothing to do, no ground of existence.

ARTICLE III. — SECTION 1.

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Here the Constitution establishes "one Supreme Court" as a permanent co-ordinate branch of government, and thus takes a unique step in the history of the Judiciary. Theoretically this view had long been known and declared, but never practically realized, at least not in its present completeness. Now the third stage of the governmental process becomes explicit, and is incorporated in the organic Law.

The first matter is to secure its independence as one of the three co-equal Powers. The Judges are primarily to be removed from the influence of Party in a government worked by Parties. How can this be done? The Judges are appointed by the President and confirmed by the Senate, but hold their office for life, subject, of course, to impeachment. Congress cannot diminish their compensation during their term of office. Through their life-tenure and their fixed salary, both secured by the Constitution, the Judges are fairly protected from undue Presidential and Congressional influence.

Such is the object of these provisions: to make the Judiciary equal in authority and origin to the executive and legislative Powers, and to protect it from their possible domination.

Both the President and Congress are partisan, being elected by Political Parties and for a limited time. But the National Judges are not so elected

nor so limited; they are to represent the pure universality of Justice quite independent of time or party, though they, too, as we shall see, are in the great evolution of the ages. They do not make the Law, but receive it ready-made; their function is to bring it home to the individual impartially.

And yet there is no doubt that the Supreme Court has slowly shaped and developed the organic Law of the land by its interpretation, which has gradually built up the legal edifice of to-day. This work, however, has been accomplished by the Judiciary in its own sphere, which is to return the enacted law to its primal creative source in the Constitution, and without partisan or personal bias, to declare its agreement or disagreement with that fundamental Law.

Thus the Supreme Court takes the individual citizen in his special case, and brings him back to the fountain head of the Nation's Justice, namely, the Constitution. It, so to speak, constitutionalizes every man in the country, connecting him with the primordial fountain of legality, whose object is to secure Free-Will.

There is one point which is left out of this section — the number of Supreme Judges. It is a dangerous omission, it furnishes an aperture for partisanship to crawl in and determine the decision of the Court. It doubtless has done so in one notorious instance.

In 1789 Congress at its first session passed the Judiciary Act which is really the organization of the national Courts. There were made thirteen districts, in each of which a Judge was to be appointed; these districts were divided into three circuits, in each of which was a Circuit Court presided over by one Supreme Judge assisted by the District Judge. Not till 1869 was the act passed creating Circuit Judges. In 1891 the Circuit Court of Appeals was established. The Court of Claims was established in 1855 for the purpose of adjudicating claims against the government. Such are, in general, the "inferior Courts" which have been organized by Congress after the present section.

Over all is the Supreme Court of the United States, which originally consisted of a Chief Justice and five Associate Justices; at present there are eight of the latter. Thus they form a kind of deliberative body, analogous to the Legislature. Six Judges are required to pronounce a decision. The judicial body goes over each case twice: once to find out the judgment of the majority, which has then to be written by one of the Judges; a second time when this written opinion is submitted to the Court for adoption as its decision. Such a decision is then the completed Law, as it has gone through the entire process of Law-making, starting with the Legislature proper, passing through the Executive, and

finally confirmed (or possibly negated) by the Supreme Court. Thus we see again that the judicial body of the Nation has in its function a return to the legislative Power, whose Law it considers anew, re-affirming it or rejecting it.

And the reason of this final judicial enactment of the law is manifest. The legislative Power, looking simply at the particular law to be made, may forget the universal end of the State, for Congress is a partisan body and chosen by a Party, the same thing being true of the Executive. Now the Supreme Court, being a non-partisan body, takes up the law enacted by partisans, deliberates upon it with eye turned toward the Constitution, whose object is to secure freedom and justice to all, and decides whether this particular Law embodies the fundamental Law of the land. Herein the Supreme Court shows the legislative element lying in its nature, the previous Law-enacting process of government it carries forward into the Law-completing process. All this is done in order that the State through its Judiciary may more perfectly show itself an actualized Will whose supreme function is to will Free-Will. For the Law as immediately enacted by a legislative body in the heat of the moment, may be destructive of freedom and so must be *mediated* by another body of men whom we may call legislative Judges, whose duty is to refer every Law back to its creative idea in the Constitution.

Such is the attempt of the framers of the Constitution to establish a more complete system of Justice than any hitherto known in history, by giving to the Judiciary a more exalted position in the State than had ever before been done. It is now a Power co-equal with the purse and the sword, with the Legislative and the Executive Powers, to both of which in the European Nations it has certainly been subordinate. So grand a start was made by the American Republic to do Justice, elevating it into the primal process of Government itself.

II. THE APPORTIONMENT OF JUDICIAL AREAS.—When we read in Section Second of the present Article that “the Judicial Power shall extend to cases, etc.,” we receive the idea of the judicial field which is to be apportioned according to the divisions which follow, and which break up this field into certain limited portions here called Areas. As these are Areas in which the Law is to be administered by a judge, they are called Judicial Areas. As the content or subject-matter contained in these Areas is the single case in some form with its two parties opposed in litigation or controversy, we have also named them from this point of view Areas of litigation, the term suggesting the litigants as individuals whose conflict is the source of the trial before a tribunal, and may extend from the bottom to the top of the judicial system.

Now there will be divisions of the present subject according to the three elements here involved. Before going into the special consideration of this Article by Section and Clause, we shall set forth these divisions in their process as well as the principles which, in our judgment, underlie them.

A. *Areas of litigation divided according to their legal sources.* Such a division is not directly stated, but is implied in Section Second, which gives simply an inventory of items. Still we wish, if possible, to see the principle running through and grouping these items. Litigation springs from some conflict with Law, and it is this Law which has various sources or covers a variety of Areas. Let us try to classify them:

1. The external relations of the country give rise to litigation. This is seen in legal controversies (*a*) which come up under treaties with foreign nations, (*b*) which pertain to the diplomatic service (embassadors, etc.), (*c*) which are connected with the sea (maritime jurisdiction).

2. The National Government in its inner working produces litigation. This is seen in cases arising under (*a*) the Constitution which is the Supreme Law, (*b*) under the enactments of Congress, (*c*) under the decisions of the national Courts, which form a hierarchical order from lowest to highest, the top being the Supreme Court which may decide against its former decision.

3. The Single-State in its relations to the United States, to other Single-States, to its own citizens and to the citizens of other Single-States, is productive of litigation. This may come from (*a*) the State Constitution, (*b*) the State Legislature, (*c*) the decisions of the State Courts.

In such fashion we may order the Areas of legal controversy into divisions and subdivisions according to their sources in Law, which method is suggested by the contents of Clause First Second Section of the present Article (III). It is evident that these Areas constitute a division of the subject-matter of Law according to its various sources, which are here classified in the most immediate way.

But in the next Clause (Second) of this same Section, a new division is hinted, made from a different point of view. We hear of *original* and *appellate* jurisdictions, which divide litigated Areas in a new way, namely from the side of the Court's jurisdiction, which is itself first divided and then throws its own division into litigated Areas brought before it.

Manifestly such a method of division moves in a direction opposite to the preceding method, which took the litigated Areas from the outside as they came into Court divided immediately according to their various sources. But now the division proceeds from the Court itself, is mediated by the Court, which apportions the Areas according to its own inner division. So we have

B. *Areas of litigation divided according to the jurisdiction of the Court.* The distinction of jurisdictions is an inherited one from English Law, and is taken for granted by the Constitution without further definition. In general it springs from the nature of the cases to be adjudicated. Small matters are to be disposed of without further appeal. To be sure the sum of money involved does not always determine the importance of the suit, but the principle at stake. The property value of Dred Scott as a slave (say 1,000 dollars) was not worth the appeal to the Supreme Court, but the principle involved meant war, emancipation, billions of money and a million lives. The kinds of jurisdiction may be briefly ordered as follows: —

1. Original jurisdiction, the beginning and end of a suit at law, is given to the Supreme Court in certain specified cases. 2. Appellate jurisdiction is given to the same Court, in a lump, as it were (Clause Second, *infra*). The Judiciary Acts of Congress still further amplify and organize this kind of jurisdiction. Strictly speaking, the Supreme Court is appellate only in the sense of *appealed to*; other national Courts are appellate in the double sense (*to* and *from*).

3. We should add here final jurisdiction, which is a term used also in the present connection, and implies that certain kinds of litigation cannot go on forever, but must stop at a given Court.

So much for the division coming from the side of the Courts. But in Clause Third of the same Section (Second), we read of the trial of *crimes*, which word at once introduces a new distinction, that of criminal and civil cases. This distinction also is taken for granted without further explanation. But it is manifest that now we must reach down to the individual litigant and his intention or Will. For it is his Will which makes him a criminal or merely a civil litigant. If the Will of the individual is consciously to assail the right, that is, the Will of another, then he is guilty of a crime, and is punishable for his Will.

This distinction must also be set forth as it is pre-supposed in the present Article (III), and really is in a process with the other two distinctions of judicial Areas.

C. *Areas of litigation divided according to the intention of the individual litigant.* The latter is usually the defendant who is charged with some wrong, unintended or intended, which wrong is to be corrected by the Court. Here we penetrate to the fundamental fact of all judicial proceedings. It is the individual litigant whose Will is the starting-point of legal controversy. The Chief Justice of the Supreme Court of the United States is at the top of the legal ladder, but the defendant against whom some wrong is charged, stands at the bottom, and sets the judicial machine going, which is to undo the wrong.

The defendant, then, has done a negative act, possibly without design; his Will has violated the Will of another in some way and thus started the judicial process, which may run the whole gamut up to the Supreme Court. Now we can see the essential function of the Judiciary from the foundation to the apex: it is through the Law to undo the wrong done, or, more technically, to negate the negative deed, which has been born into the world by the Will of the individual assailing or destroying the Will of another individual. The Self violating the Self of the neighbor, violates Selfhood, and calls up Justice, which is organized to return the deed to its doer.

Such is the psychical element underlying the present subject which we shall briefly unfold into the distinctions stated or implied in the Constitution at this point, which distinctions show a graded series of wrongs or negative deeds done by the Will of the defendant or charged against him by plaintiff or prosecutor.

1. Civil wrong; the negative act charged is supposed to have been done without the intention of violating the right (or the Will) of the plaintiff. Both parties acknowledge the Law and appeal to it, but the judge has to declare on which side is the Law.

2. Criminal wrong; the negative act is done with intention which violates the Will in person or property. Such crimes are to be tried by a jury,

according to Clause Third of Section Second. But in the next Section we pass to a different kind of crime.

3. Treason; the crime against the State when the latter is sought to be overthrown. The negative act now intentionally violates not only the single Law, but aims to destroy the source of Law. It assails not merely this individual Will, but the Institution which is to secure all Will. So it is considered the sovereign crime, being the crime against sovereignty.

Such are three Areas of the negative Will of the individual which have to be met and overcome by the judiciary in the administration of justice. It will be observed that these Areas are divided according to the Will of the individual toward the Law and its origin. And the Supreme Court requires the special case to bring it into operation; it does not pass upon the constitutionality of a Law merely as Law, but only as embodied in the act of a person, which is charged with being negative or with being a violation of Law.

Looking back at these three ways of apportioning judicial Areas, we observe that they are connected in a process. First is the division of them from without, as they are brought into Court. But, secondly, the Court divides them anew, from its side. Third is the division according to the degree of negative Will in the defendant, or, in the person arraigned before the Court for a vio-

lation of the Law derived from some of the sources above indicated under the first head. So the Will of the individual (to be classified here according to its negativity) goes back and violates the Law (to be classified here according to its sources) which Law is to be administered to the individual by the Court (to be classified here according to its jurisdiction). Thus we are to bring before ourselves the process underlying this subject, and calling forth these somewhat minute cross-divisions and subdivisions of judicial Areas of the present Article of the Constitution.

ARTICLE III. — SECTION 2.

Cl. 1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

Cl. 2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Cl. 3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the

State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

This Section as a whole seeks to define the jurisdiction of the national Courts taken in its entirety. There is what may be called the unlimited jurisdiction in which the Court alone decides; then there is the limited jurisdiction in which the Court has to share its powers with a jury. Also there is mention of appellate and original jurisdiction of the Supreme Court. All these distinctions pre-suppose an inherited Law, which is to be still further defined and re-enacted by Congress.

A curious instance of such inheritance is found in the phrase, "cases in law and equity" (Clause First), a distinction of old English Law which has been abolished in England, but cannot be abolished in the United States Courts except by a change of the Constitution. Here it lies imbedded, as it were in crystal, while several of the Single States have done away with the distinction.

In *Clause First* is strongly asserted the supremacy of the National Judiciary in all legal matters pertaining to the United States, in all cases arising under its Constitution, its Laws, and its Treaties. The federal Court is to try the federal case, the one "in which the United States shall

be a party." This is a general assertion of judicial sovereignty, which also is valid in all external relations, "cases affecting ambassadors," etc. Still further, the National Courts have jurisdiction over all legal questions involving inter-State relations, a judicial supremacy which has banished the conflict between States, and which may yet give the pattern for a World-Judiciary to settle wars between Nations.

One modification of this Clause has been made by the Eleventh Amendment: The Single-State cannot be sued by an individual of another State in a federal Court. Some States of the Union have taken advantage of this Amendment to repudiate their debts. The Supreme Court has decided that the United States can sue a State.

In general, this judicial sovereignty of the Supreme Court is intimately connected with the political sovereignty of the Union. From the germinal provisions in the present Clause it will be developed, particularly by Chief-Justice Marshall, into its full validity as a co-equal yet co-operant Power in the threefold process of government. The judicial Areas here mentioned are given in brief outline, with less detail and definiteness than either the executive or legislative Areas, but the creative thought is spoken, and that was enough for the constructive genius of Marshall.

Into this general inventory of jurisdiction, the *Second Clause* introduces a new distinction — the original and the appellate jurisdiction of the Supreme Court. Certain Areas are specially marked off from the rest and assigned to the original jurisdiction of the Supreme Court, which Areas (it has been decided) cannot be increased nor diminished by Congress, they being affirmatively established by the Constitution. In original jurisdiction the Supreme Court has the field to itself; in it the suit is commenced and ended. But in cases brought up from lower Courts it has appellate jurisdiction. To these two kinds we may add a third, not here mentioned, the concurrent jurisdiction, which, however, is incidental, being a matter of convenience rather than of necessity.

Thus we behold a hierarchical order of the Judiciary, composed of various grades of appeal from the lowest Court to the highest. * Such an order was established fully by the Roman Law, which had as its ultimate “the appeal to Cæsar.” From the Roman Law this graded order passed into the Church, in which the real hierarchy was organized from priest to Pope. But from Cæsar or Pope there was no appeal, except by revolution. From the Supreme Court of the United States there is an appeal, namely, to the People who may reverse the decision though in an extra-legal way (Dred Scott). The term

appellate has a double meaning: appealed to and appealed from. In general, every Court has and has to have a threefold process of jurisdiction: original, appealed to, and appealed from; it has a sphere of absoluteness, of superiority (to other Courts), and of subordination (to other Courts or Powers); it is, in the judicial order, self-determined, determining and determined, being all three yet one process. Each Court is primarily itself, then it has to make itself a member of the total judiciary, a link in the whole chain. There has been an attempt to remove the so-called Courts of Appeal from this process, in part at least. And the Supreme Court of the United-States is the Court of last resort, or last legal appeal, thus it caps the judicial hierarchy. We have already spoken of this kind of jurisdiction, namely, final, which belongs or may belong to every Court in certain cases.

Clause Third introduces a new distinction: the regular or professional Court becomes limited in the jurisdiction of certain cases by sharing it with a jury, a non-professional Court. These cases are called criminal, which introduce the individual as defendant with his intention, his inner attitude toward the Law. Thus a new element enters, that of intention, which a new set of judges are to determine. The professional judge is properly to apply the Law; but here is a person, who as criminal, is charged with violat-

ing or destroying the Law, and hence destroying the lawyer, who as judge is to administer the Law. So the latter is not allowed to sit in judgment on what is largely his own case. The Court applies the Law to the deed; but in the deed may or may not lie criminal intention; this is what the jury specially must settle, and thereby determine the penalty.

ARTICLE III. — SECTION 3.

Cl. 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court.

Cl. 2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

The previous Section in its last Clause brought up the element of intention, which enters into the criminal offense. Such criminal intention may be directed against some special Law which is violated, or it may go far deeper and direct itself against the source of all Law, against the State itself. This latter act constitutes treason, the crime against the existent political institution, which is attempted to be overthrown. The subject of the present Section is, then, treason, to which two Clauses are devoted.

When we consider the situation fully, the present Section is not devoid of a latent humorous

touch. It is derived from the English Law, yet under that Law probably every man sitting in the Convention, from George Washington down, had been guilty of treason. Now these traitors legally are making a law for the punishment of traitors. One cannot help thinking that they all must have enjoyed their comic situation, and have shuffled the matter off with a kind of inner cachinnation.

The Right of Revolution from a central authority is what had been asserted by the Declaration of Independence some eleven years before, and had been successfully maintained by a seven years' War of Rebellion. But now this entire principle must be turned around into its opposite, and the spirit of the people must be turned with it. The Right of Rebellion being vindicated by victory, is to be transmuted into the Wrong of Rebellion just by this Constitution. Such is the grand metamorphosis, which the Nation has to undergo and has already largely undergone since the peace with Great Britain, being scourged to it by bitter experience. Traitors must undo their negative deed and make treason punishable.

It lies deeply imbedded in the Anglo-Saxon spirit that there is a Right of Revolution and also a Wrong of Revolution. Shakespeare, the great institutional poet of his people, has portrayed both in connection: the former in *Richard the Second*, the latter in *Henry the Fourth*. The two

chief heroes of American History represent these two principles respectively — Washington the Right, and Lincoln the Wrong, of Revolution.

The framers of the Constitution in a certain sense embodied the Right of Revolution in their instrument, only it was to be accomplished by peaceable means. When the people wish to change the government, they can do so legally by vote; the Constitution provides for its own alteration or even abolition (see Article V.). Strictly there was no ground for rebellion in this country, still it came and so meant a relapse to revolutionary violence. This was indeed the Wrong of Revolution. During the Civil War treason again came into great prominence on both sides, and did not wear the mild look which it does here in this Constitution.

In *Clause First* treason is defined: it “shall consist only in levying war against them (the United States), or in adhering to their enemies, giving them aid and comfort.” Mr. Madison held that this definition was too narrow and that more latitude in this matter should be given to Congress. Not so the members of the Convention, who did not wish to be too hard upon their former selves. So they inserted the significant word *only*, and determined carefully the nature of the testimony “to the same overt act.” The definition is composed of two small fragments of a statute of Edward III.

The Convention refused to declare the penalty of treason but turned the whole matter over to Congress in *Clause Second*, with a final sentence whose object is to mitigate the punishment by confining the consequences of guilt to the person of the offender. In England "the attainder of treason" worked "corruption of the blood," thus involving innocent children in the offense of the parent. At this point the subject is dropped—we can imagine with what relief—by the members of the Convention, glad to escape from the infliction of their own penalty even in imagination.

Such is the second division of the Judicial Power as unfolded in the Constitution, which we have designated as the Apportionment of Judicial Areas. The various causes and materials of litigation move into the Supreme Court, being ordered and assigned according to the aforesaid divisions which are made essentially by the Constitution. But the Supreme Court acquires new Powers and expands over new Areas. Not only is fresh food brought to the organism for its support, but the organism itself is developing into new stages of judicial evolution. This, too, must be looked at, though it be post-constitutional.

III. THE NEW APPORTIONMENT OF JUDICIAL AREAS.—We have seen that from the Legislative and Executive Departments new questions are con-

tinually arising which demand judicial settlement. New Areas move into the horizon of the Court, hitherto unassigned; there has to be not only a new exercise of old Powers, but new Powers must develop themselves, growing naturally out of those already existent. The Constitution is also in the process of evolution and the Supreme Judiciary must respond, has responded. As an integral part of the government it has to have also an element of statesmanship in it, which cannot belong to any subordinate Court. Still its function is judicial, and it is not to encroach upon the other departments of State.

The Supreme Judge should be something more than a literalist, than a case-lawyer, though he is not to dispense with precedent. He is to interpret the Constitution; this duty throws him back upon its spirit, upon its fundamental meaning, its creative idea. Through the word he has often to reach beyond the word of the Constitution, and give a new utterance to the thought that created it. Thus in a way he has to re-make the Constitution, of course always after and by means of the Constitution. Thus he is brought into immediate communion with its sources, with the spirit that called it into being. By the nature of his position he has often to transcend a formal legalism and penetrate to the soul of the State with its Law, to its very psychical origin, and adjudge the cause before him in accord with

that. In other words he must often rise out of legality into universality, and be not merely the lawyer, but the psychologist in the highest sense of the term.

Here again the shining example is John Marshall. When he says passingly in a well-known decision that "the original supreme Will organizes the government and assigns to the different departments their respective Powers," he has given in psychical terms the genesis of the State from the Will, as well as suggested its threefold division from the same source, to which all Law is, finally to be carried back for interpretation. The passage shows what was ever present to his mind in expounding Law and Constitution. Moreover such was the influence of his creative genius that he carried his associates on the bench with him, his opinion being reversed only once during his whole career, and this opinion being now considered good law by the profession. Judge Story, who was his associate on the bench for many years, and who was a specially good case-lawyer, remarks that Marshall rarely cited the cases of adjudged authority, though he knew them, but he relied upon his own insight into fundamental principles. This statement of Story suggests the pivotal characteristics of the great Chief-Justice: he was the original creative Judge, who in spite of the limits of his vocation whose maxim is *stare decisis* (a maxim absolutely essen-

tial in its place) could for his decisions draw from the original fountain-head of the Constitution itself, and re-create it in entirely new relations, yet in complete accord with itself. So he was the great synthetic Judge, keeping the Whole before his mind, and interpreting the special case and the special statute in harmony with that Whole. His successors, it must be confessed, have been chiefly analytic lawyers, also great in their way, but too often in their analysis reducing the Constitution to a self-contradiction, which became explicit and openly pronounced in the Legal Tender decisions.

It has already been noticed that the Judiciary was the least developed, the most immature, and the most helpless of the three Departments of Government. Hamilton in the *Federalist* (No. 78) gives rather a pitiable account of its weakness, as it "has no influence over either the sword or the purse;" "it may be truly said to have neither FORCE nor WILL;" "incontestably the Judiciary is beyond comparison the weakest of the three Departments of Power;" he cites a passage from Montesquieu declaring: "Of the three Powers the Judiciary is next to nothing." As a possible source of usurpation and tyranny Hamilton feared most the Legislative Branch, and next the Executive, but from the Judiciary alone "liberty can have nothing to fear." As he had a leading part in framing the Constitution, we can see how

he tried to protect this weakling by separating it wholly from the other two Powers and making it independent of them, as well as by marking out their limits in much greater detail. Fortunately for the infant it gets committed to the very best hands and will have an unprecedented growth.

So the new Apportionment of Judicial Areas will properly show the development of the Judiciary as it widens out its field and asserts new Powers growing out of the Constitution. The history of the Supreme Court of the United States naturally falls into three periods, each of which we will touch upon in succession.

1. The classical period is that of Marshall who was appointed, January 31st, 1801, and held the position of Chief-Justice till his death, July 6th, 1835. During the eleven years before his appointment two Chief-Justices had resigned, one had been rejected by the Senate, and one had declined. Such a record gave a not very promising outlook, the child had certainly not had a vigorous infancy, when Marshall took it under his care. But soon the new spirit began to show itself.

In 1803 the Supreme Court explicitly asserted its rights to declare an act of Congress invalid which conflicted with the Constitution (*Marbury vs. Madison*, decision by Marshall). This right lay in the Constitution, but it had to be expressly evolved out of it and declared to be the law of

the land. A great step in advance, for the Court has openly vindicated its judicial supremacy within its sphere over the legislative Power, of whose encroachments Hamilton felt such a dread. Here then is the limit firmly drawn upon it, and the National Judiciary has asserted itself as an independent yet co-ordinate and co-operant Power of the Government.

In the same decision was another claim which created a great turmoil in the breast of President Jefferson. The Court declared itself to have the power to compel the Secretary of State, who belonged to the Executive Department, to deliver a commission to its rightful possessor. Here the judicial supremacy of the Court within its constitutional sphere was asserted against the Executive, though for another reason the Court did not push its claim to the point of action.

But these steps of the Judiciary were not taken without opposition. There was an attempt to oust the Judges by means of impeachment, beginning with Associate-Justice Chase, who was, however, acquitted. Then came another attempt to take away the life-tenure of the Judges and subject them to the Legislature and the Executive by means of a constitutional amendment; but this attempt also failed. It was really a battle between the great Virginians, Jefferson on one side and Marshall on the other.

The latter manfully held his position and pro-

ceeded to take another great step in advance. He had vindicated the place of the Judiciary in the National Government, making it co-equal with the other two Powers in the total governmental process. Now he is ready to tackle the Single-State — a far more difficult problem. In 1806 the Supreme Court pronounced a State law void for the first time; but not till 1816 did it affirm its judicial supremacy over State Courts in cases involving Federal questions. Furious was the outcry, with charges of usurpation; but Marshall kept on in his great work for eighteen years more, re-affirming his decisions and establishing their doctrines in the legal consciousness of the whole Nation.

Looking back at this movement we can see that Marshall fought and won the first great battle for the Union. The Virginia Resolutions of 1798 (whose author was Madison) declare that “the States have the right and are in duty bound to interpose for arresting the progress of the evil,” namely, the unconstitutional acts of the Federal Government. More emphatically the Kentucky Resolutions of 1798 (whose author was doubtless Jefferson) affirm that “the government created by this compact (of States) was not made the exclusive or the final *judge* of the extent of the powers delegated to itself,” but that each State “has an equal right to judge for itself as well as of infractions, as of the mode and measure of

redress." Mighty and long-continued is the answer of Marshall to these claims: I shall make the Supreme Court the judge of all infractions of the Constitution by the general Government; and furthermore you, O Single-States, shall not escape the same Law, for I shall make that same Court the judge of your infractions of the Constitution. And he did it.

It has been long recognized that the Virginia and Kentucky Resolutions above cited contain the germ of the secession doctrine, though their authors disclaimed any such purport. They strikingly represent the attitude of Virginia in 1861, just before she went into rebellion. The great political leaders of 1798, Jefferson and Madison, who were put down by Marshall in law, were transformed in 1861 into military leaders equally great, if not greater, Lee and Jackson, who had to be put down in war. Mighty is the Idea, truly the creative, archetypal form which moulds the coming reality after its image; those two Ideas, Union and Secession, born with the birth of the Constitution, rose up and fought their spiritual battle, with defeat on the one side and victory on the other, long before they broke out into physical conflict, and entered flesh and blood, re-enacting in visible reality the same struggle with a like defeat and a like victory.

It is true that Marshall in some of these steps was anticipated by the States. The Supreme

Court of Rhode Island in 1786 had declared a legislative statute void because it conflicted with the Constitution of the State. In Virginia, Marshall's home, a similar case is reported for 1782. This principle, starting with the Single-State, was made national, even to the extent of subordinating the Single-State, whence it arose, in the matter of Federal questions. Marshall, however, made a double use of it, applying it both to the acts of the National Congress and to State Laws. It is to be noted that the Supreme Court does not repeal a statute which it decides to be unconstitutional, it cannot take the place of the original Legislature. Its decision applies to the particular case in controversy, and another such case might be brought before it, though such a proceeding would be deemed futile by attorneys and the lower Courts.

2. The second period in the development of the Supreme Court embraces, in a general way, the time during which Chief-Justice Taney presided, who was appointed March 15th, 1836, and died in office Oct. 14th, 1864. A manifest reaction now takes place from Marshall's strong sense of nationality toward the doctrine of States' Rights. Still on the whole the Court kept the power which Marshall had won for it, and began using that power for a new purpose, namely, for nationalizing slavery. The bitterest foes of the Court's development had been the

Slave States, but now they took possession of it, and wielded its ascendancy for their own purposes.

The culmination of this period was Taney's decision in the Dred Scott case, which may be regarded as the most significant, epoch-making, judicial decision recorded in History. That suppressed strand of destiny woven into the Constitution at its birth has risen to the top and is no longer to be put down. The Court decides that a free negro whose ancestors have been slaves is not a citizen within the meaning of the Constitution and cannot sue in the national Courts. Such is the decision of the Supreme Court according to its official report, but the correctness of this report is disputed by Mr. G. T. Curtis (*Constitutional History*, II, p. 275-6). A majority of the Court also declared that the Missouri Compromise, excluding slavery from certain territories, was unconstitutional. The effect of the decision was to fix the racial limit as a qualification for citizenship; the African whose ancestors were slaves cannot become a freeman with civil rights in the United States.

An inner revolt took place at this decision in many souls, a revolt as of Human Nature itself. One of the Associate-Judges (B. R. Curtis) in a dissenting opinion of great power still upheld and interpreted the Constitution as a document of freedom. But the cardinal fact of the time

was that this decision called up the coming man, Abraham Lincoln, and gave to him his theme, which was: The Dred Scott decision must be reversed by the People. And this reversal must be lawful, by Constitution and not by Revolution. This is the pivotal point in the famous debate between Lincoln and Douglas in Illinois during the year 1858. Two years later the People elected Lincoln to bring about this reversal. And it was brought about with a crash, which not only annulled the decision but annihilated slavery.

Judge Taney's judicial career practically wound up with the Merryman case which occurred during the war, and in which he sought to interpose the *Habeas Corpus* provision against the Executive Power in favor of a man who was enlisting soldiers for the Southern Army. This may be fairly deemed the end, indeed the suicidal end of Taney's epoch of the Supreme Court. He invoked the Constitution to set free a person who was raising soldiers to overthrow the Constitution, and to destroy the Union which was the declared object of the Constitution. Thus he brought to its logical outcome the States' Rights' view of the instrument, and not only nullified it but made it nullify itself. Still the Constitution had a positive and lasting principle in itself, it lived on through the war, and saved itself, carrying along in its bosom and saving that judicial body which held that it had no right to save itself.

3. After the war comes the third period in the history of the Supreme Court. It began to return to Marshall, re-affirming the lines which he had laid down, particularly as to the supremacy of the National Government. But it cannot be said to have shown any of the great original ability which characterized it while he presided over it. To be sure a second Marshall could hardly be expected in the same century, and to judge his successors by his standard is not fair. Still one cannot help thinking that what he had won might have been better preserved.

Two occurrences must be noted which have had a tendency to lower the Supreme Court in the opinion of the People. First was its part in the Electoral Commission to settle the presidential vote of 1876. It suffered itself to be dragged into a political contest, wholly extra-judicial, in which it gained the name of being as partisan as the ordinary politician. Thus it negated the very purpose of its existence, namely, to be a non-partisan judicial body, whose members, through their life-tenure and fixed salary, were placed out of the reach of party politics by the Constitution itself. This was the hardest blow the Court ever gave to itself, with the exception of the Dred Scott decision. Both political parties were equally involved, so that there was no corrective. In fact, looked at from the point of party man-

agement, it was the most consummate political trick that one party ever played on another. For the Republicans gained all the advantage of the scheme, yet dragged their foes in the same mire with themselves, so that the sharpest eye could not tell which side came out the most befouled.

The other injury which the Supreme Court has received, coming in part from itself and in part from the President, was connected with the Legal Tender decisions. Now it is true that the Court has a right to reverse itself, must reverse itself in the slow process of time, but not in a year during a period of peace. One Supreme Law in 1870, just the opposite Supreme Law in 1871: that shakes and unsettles the very ground of jurisprudence. Still further, before the second decision the Court was changed by the appointment of two new members, just enough to bring about the reversal. The suspicion was proclaimed at the time and it still lives, that the Court was "packed." The truth of this suspicion has been stoutly denied, but the number of connected circumstances corroborating it keeps it alive. Then there is a second decision (1884) which asserts the power of Congress to issue paper money, not for meeting a great emergency in time of war (which was the ground of the first decision in 1871), but as an attribute of national sovereignty. Hence Congress can at any time "emit bills of credit," without any interference of the Supreme Court.

Still in spite of these periods of obscurity the Supreme Court of the United States is the most important and venerated tribunal in Christendom. But one has to think that it too with the rest of the world has before it a good-sized field for improvement in the coming Twentieth Century. It has to change, it also must reflect the progress of the ages, but its part is rather that of the balance-wheel in the machinery of government, it must move with the other parts but should steady this movement that the whole remain with itself in all its most strenuous activity, and unfold toward its end through law and orderly development. The Supreme Court may exclude revolution, but not evolution.

Such, then, is the third element of the governmental Process, the judicial, which returns to the enacted law of the Legislature and gives to the same its final sanction, bringing back this enacted law to its source in the Law of Laws — the Constitution (which is the Law of Laws, at least for the United-States, though the expression sound somewhat extravagant).

We now conclude the triune movement of this part of the Constitution with its three Powers, legislative, executive and judicial. The great stress in the preceding interpretation has been laid upon the psychical Process everywhere underlying and creating the instrument. This Process is ultimately that of the Self and springs

from the Self in order to govern the Self through itself, by which thought we reach down to the foundation of Self-government. Man must be Self-legislative, he is to obey the Law, but this must be finally his own Law, to make and to complete which he calls forth the State.

It may be said that this triune Process of government is the deepest fact of the American political consciousness, is what has compelled every citizen who seeks to understand his country's institutions, to think down to their foundation and to identify the same with his innermost Self. Such a training is of untold value to him, and carries its consequences far beyond the political sphere into every phase of life. He is preparing to see the triune movement in all things, and thereby penetrate to the creative sources of his environing world. The American State is the greatest teacher that ever existed. Of course the citizen must think it and enact it in order to obtain the full fruit of its institutional discipline.

We have seen that each of these three Powers has within itself a Process which is likewise threefold. That is, each taken by itself shares in the Process of all, else it could not be a part of that Process. Each governmental Power participates in the general triune principle by being triune itself, and thereby inherently one with that principle. The legislative, executive and

judicial Powers form one Process, inasmuch each by itself in its own sphere has the others in itself.

It may be said that the American mind has by no means yet become theoretically conscious of the depths which have been sounded in its Constitution. As usual its work far outstrips its thought; its speculative ability has yet been unable to give any adequate ground for its practical performance. A few American writers of a reflective turn have quizzed themselves a little about the reason of this threefold element in the Constitution: Here is one answer: "One of the principal reasons for the establishment of different departments in the class of governments to which ours belongs is that *perfect virtue and unerring wisdom* are not to be predicated of any man in any station. If they were, a simple despotism would be the best and the only necessary form of government." (Curtis' *Constitutional History* I. p. 472.)

Such is one reason for the establishment of the three Powers in government; sinful, erring man somehow is made to construct a device which is to protect him from sinful erring man. So our sinful erring man does a very good and skillful piece of work; the wonder is that such a good thing could come from such a bad source. This is the Puritanic view, distinctly savoring of total depravity, which, though total and absolute, is able to perform some excellent deeds. Then

that last sentence of the quotation is a stinger: if man is good, despotism is the best and indeed the only government. The better the man, the more despotic should be or rather must be the State; and we have to add, the worse the man, the more free must be the State, till at last in the American Constitution with its three Powers, total depravity reaches its climax in establishing the freest, least despotic government on earth, made necessarily by the worst men for the worst men. If you really wish to find good and wise men with the corresponding government, you must go back to the Orient with its despotism, especially to those Hebrew worthies who were the grand exemplars of virtue and wisdom to the Puritan fathers.

Such is the reason assigned for the division into governmental departments by a well-known New England writer on the Constitution. We may next pass to another kind of reasoning upon this subject which is found scattered through the *Federalist*.

In No. 51 (Ford's edition of the *Federalist*), is a paper written probably by Madison, which may be taken as a specimen. Its subject is "the methods of balancing the Departments of Government;" the trend is to show that the more perfect the balance of these Departments, the more perfect the Government. But how could there be any Government whatever, when each Depart-

ment counterbalances the others, all of them being brought to a kind of equilibrium? Evidently the author leaves out the most important fact, namely, the process of these Departments with one another, which separates them indeed but also forms them into an ever-active unity, this unity being just the unity of Government.

The emphatic word in "the three Departments" is, then, *three* not *one*. There must be a contrivance by which "the several constituent parts may be the means of keeping each other in their places," as distinct, separate, independent. Division is the grand category, "division of the government into separate and distinct Departments" is declared to be the mighty protection against usurpation. Note this movement of division and sub-division. "In the compound republic of America"—this is a good term by the way—"the power is first divided between two distinct governments" (State and National) "and then the portion allotted to each is sub-divided among distinct and separate Departments," namely, the three powers in the State and National Governments. Note the inference: "Hence a double security arises to the rights of the People."

Now there can be no doubt that the division just indicated is a valid part of the governmental process, but is not the whole of it. The author of the above paper (and the same tendency can

be noted elsewhere in the *Federalist*, or at least in Madison's portion of it) places his main stress upon division, separation, while the element of unity, if not neglected, is at least put into the background. Psychically we would say that this paper considers and develops only the second stage of the governmental Psychosis, which, like the Self in man, is triune, three in one. Still the author (doubtless Madison) favors the Union, but has the Virginia view as afterwards represented and unfolded by Jefferson. Another Virginian, however, Chief Justice Marshall, gave to the side of unity its full validity. In accord with the preceding doctrine we must divide up the government doubly and then trebly into so many departments, if we are really going to have a good government. Here the deeper question rises: Upon what view of man does such an opinion rest? The answer can be given in unalloyed simplicity: Upon suspicion. Any man intrusted with power must be suspected of an intention to abuse that power, and the only way to prevent it is to set other men endowed with equal power over against him. Somehow out of this clash between the individual interests of officials good government will come forth, and the People will get its blessing. The same number of the *Federalist* (No. 51) gives us some interesting glimpses into the world-view of its author. "Ambition must be

made to counteract ambition," for every man in office is bound to be ambitious to get the whole thing for himself. So every person "who administers a department" must be equipped with "the necessary Constitutional means and the personal motives to resist the encroachments of the others" upon his Department, and of course the others are in like manner to resist his encroachments. So the demons (the officials) are engaged in one perpetual fight, each against "the encroachments of the others," making a kind of infernal pit (this being the Government), during which wrestling and scrambling of the fiends thus occupied with one another, the People can have the chance of exercising their Heaven-born freedom. One cannot help thinking of that other fight of the demons which Dante saw down in Malebolge, — in which two winged fiends grappled in the air, and thence fell into the stream of boiling pitch from whence they had to be fished out by their demonic friends. This gave to Dante and his companion Virgil (the People, let us say) the opportunity of fleeing, and so they ran with all their might for the next ditch, and into this they slid down, barely escaping their infernal pursuers.

The author of the paper we are considering does not hesitate to march forward to the conclusion that "such devices to control the abuses of government may be a reflection on human

nature." Certainly it is, and he cries out: "What is government itself but the greatest of all reflections on human nature?" Institutions, it would seem, proceed from man's badness; the better the institutions, the worse the man, who, originally good, needed no institutions or almost none. So the man keeps getting worse and worse, but institutions keep getting better and better, to counterbalance his deterioration.

This doctrine of the original goodness of man and of his degeneracy through civilization appears to go back to Rousseau and the 18th century illumination (*Aufklärung*). It is in decided contrast to the New England Calvinistic belief in original sin. Jefferson, Madison and the Virginians generally as well as the New Yorker Hamilton had absorbed a goodly share of the French culture of that age, which re-appears in the *Federalist* under various forms, both of erudition and of doctrine. Still the Americans with their ingrained Anglo-Saxon spirit drew a different conclusion from that of Rousseau who said: Back to nature away from institutions — back to the age of innocence and freedom. These Americans knew that such a return to the beginning was impossible, so they proposed to make a new set of institutions, and especially a new State which would secure man's freedom without his fleeing to the woods. They knew very well that the average American was not going to turn Indian

(Rousseau's free and noble savage); on the contrary the Indian was unfortunately the being whom the white man was bent on exterminating, often with injustice and cruelty. Not a good soil was America for that side of Rousseau's doctrine. It ought to be here noted that Rousseau had another side (an institutional one) which we may consider later.

A fundamental principle of these American publicists was that public office was inherently corrupting, and that the office holders must be by some political contrivance turned against one another, watching, suspecting, fighting if necessary, "resisting encroachments" which were sure to start in that Pandemonium of officialdom at the center of government. So the Constitution-makers were compelled to follow "the policy of supplying the *defect of better motives* by opposite and rival interests", which policy might be "traced through the whole system of human affairs, private as well as public" (same number of *Federalist*). Thus the principle is made universal, being true of man in his private as well as public relations.

Such is the defense here given of that grand device of the three co-ordinate and independent Powers, legislative, executive and judicial, whose principle is that each must check and balance the other. This doctrine of checks and balances has deserved our attention so long because it per-

meates the whole political and legal literature of the country from the bottom in the newspaper to its top in the decisions of the Supreme Court of the United States. Commentaries on the Constitution usually fall back upon it as the ultimate ground of the main devices of that instrument.

It seems not difficult to see that such a doctrine is negative, and if literally applied would negative the working of all government, and still further, that it rests upon a negative view of man, especially of the administration of the State. Herein the New England Puritan and the Virginia Liberal come to the same result though they had opposite starting-points; the one thought that man was bad from the beginning and has kept it up with exceptional cases by the grace of God; the other thought that man started good but has gotten bad, or will certainly get bad if he be given an office. Yet this office must be; so the grand question is, How shall we protect ourselves against its occupant? By a cunning contrivance which turns the office holders (the rascals) against one another; thus let devil fight devil and the People run free.

One queries why such a negative doctrine could be given as the ground for such a great positive work as the Constitution. The time had much to do with this matter. The American people of that age were plagued first with the

British officialdom, which they fought for seven years and at last threw off. But after the conclusion of the Revolutionary War, the States and their officials showed themselves selfish, tyrannical, veritably demonic, till they realized a kind of Pandemonium. So the great problem with the framers was: How shall we overcome this deeply negative condition of the whole country? Accordingly they started with the fact before them as fundamental and sought to transform such a condition through this new Constitution with its manifold cunning devices.

That the present work refuses to accept any such theory of the Constitution, is manifest from the foregoing exposition. We hold to a positive view of man and of his great institutional product, namely this instrument, though the negative element is a part of the process of the State, which in its threefold movement is a perpetual overcoming of division, separation, negation. Division is not the end. Madison holds that Congress is divided into two Houses in order to break its power in two. Both he and Hamilton thought that the Legislature was the most dangerous branch of government; hence we must divide it in order to weaken it by setting one House against the other. Here again suspicion is the supposed ground of a constitutional provision, which we call a negative and not a positive reason. Such is the mighty virtue of division:

first we divide the Whole into State and National Governments and set them to watching each other; then each of these divisions we subdivide into the three Departments and set them to watching one another; still further, we divide the Legislature into two Houses and set them to watching each other. Such a government would be simply the negation of all government. Yet this is the theory almost universally held in America concerning the reason of the State's existence, and of its various Departments.

So much for the different grounds of the threefold Process, legislative, executive, judicial, which has been given in the first three Articles of our instrument. But now we are to pass to a deeper fact: This Process is but a stage of a still vaster and profounder Process, also threefold, and also given in the Constitution. Four more Articles there are, coming after the three mentioned; what do they mean and what does the Whole mean? A new stage of the total constitutional movement we are next to grapple with not by any means so distinct or so fully elaborated as the preceding movement.

THIRD DIVISION.

We have now reached the Fourth Article of the Constitution, and entered our Third Division of its total movement, which Division embraces the last four Articles (4th to 7th inclusive).

If we compare these Articles with the previous three, they will seem to lack careful arrangement, to be thrown together in a rather miscellaneous fashion. The Convention's Committee on Style evidently did not see their way so clearly as before, and with good reason. The threefold Powers of Government (legislative, executive and judicial) time had ordered for them and they had but to reproduce what had been transmitted to them, undoubtedly with new applications. But in the Third Division they break into the new realm of the political Institution, largely undiscovered.

Thus the present Division will have a character of its own; instead of the exact systematic order of the preceding Second Division, it will show itself fragmentary, but very suggestive, foreshadowing somewhat cloudily the vast outlines of the coming Nation. Much briefer in words — hardly one-fifth as long — it has a much huger content, namely, the Future. Verily it is the

prophetic part of the Constitution, that which is yet to become real, and it necessarily has the vagueness of prophecy. Here, too, lies specially the changing, evolutionary element of the instrument, while the Second Division presents more the fixed, established portion thereof, since it pertains to the Law, yea the Law of the Law in its completed process.

Hence this Third Division may be rightly deemed to be more difficult to understand than what has gone before. Also, it is more difficult to arrange in its general movement, although the development of a hundred and some years will be its best interpreter and organizer.

How shall we grasp its varied material into one general thought which underlies and indeed creates the whole? We may note a common idea running through it, which for the present can be called Reproduction of the State. Each State must, so to speak, reproduce the other ideally, by recognizing and willing this other State to be what it is in essence. Then the new Union must show itself able to reproduce the new Single-State; also this Constitution must assert its self-renewing, self-reproducing power through amendment and total transformation of itself, if need be. But even in this power of self-evolution it must assert its own absolute supremacy, and insist upon reproducing itself in every official person, State and National, who takes part in

administering government, and who, therefore must be bound by oath "to support this Constitution." Finally, ratification means that this Constitution is to be laid before the People who are to read and study it, thereby reproducing it in their consciousness and affirming it as their own by their votes.

In all this subtle and somewhat devious movement of the Third Division before us, we may behold the reproductive process of the constitutional Union (or State of States). As the Union is reproductive, so it must be State-producing; thus it is truly creative of itself, and possesses the genetic power of self-propagation. For, as the Union was made by States, and endowed with their creative character, so it must in turn be able to make States, must be able to go back and reproduce its origin, and thus be complete in itself. And these new States thus produced must be also reproductive of Union and Constitution.

Such is the general idea, which we may now separate into distinct points as they follow in the several Articles of this Division.

(1) Recognition of each State equally by the other States, and also the recognition of the citizen of any State by the other States. Thus the existent States have a mutual self-recognizing and so self-reproducing life and bring forth what may be called State altruism. This is what is established in the First Section of Article Fourth.

In the next Section the Constitution commands the Single-State to recognize not only the other Single-State as co-equal with itself, but the citizen of the other Single-State as co-equal with its own citizen. Thus the Constitution reaches out to every individual Will of the land, and by its supreme authority secures the same in and through the Single-State, which is bidden to will the Free-Will of the citizen of every other Single-State as fully as the Free-Will of its own citizen.

Such are the two great Recognitions required of each Single-State by the Constitution, whereby the former in its governmental acts affirms and so reproduces ideally every member of the Union, both as State and as citizen. If this we may call an ideal reproduction, we have in the next Section (Third) the real reproduction.

(2) This is the reproduction of the new Single-State through the Union, which new State, after being produced by the Constitution, returns to its source, reaffirms and reproduces the Constitution. The process here is, first, the potential State, which is a territory surveyed, protected and otherwise prepared for settlement—the extreme limits in both directions, that of the little farm and that of the great State, being fixed by the Union. Then the People move in and form for themselves their local institutions, from township up to the State. Finally, when ready the new State is admitted to the Union,

which means that it returns to its fountain head, the Union, uniting itself with the same, and thereby sharing in its reproductive (State-producing) power. Thus the People of the State, when they assume Statehood, practically reenact the Preamble of the Constitution: "We, the People, do ordain and establish this Constitution for the United States of America." This is a return to the beginning of the constitutional act, to its very first stage, which each new Single-State has to pass through before initiation into the Union. Thus it reproduces the National Constitution within itself, and realizes the same still further in its own State Constitution, which is mainly a reproduction of that of the Nation. In fact the National Constitution may be said to insist upon such reproduction of itself when it says "the United States shall guarantee to every State in this Union a republican form of government," which form is just its own.

3. The reproduction of the Constitution through itself (Art. V.), its self-renewing, self-evolving power is here affirmed in the instrument itself. Not only, then, does the Constitution reproduce the State, but it goes back of that and reproduces itself reproducing the State. The Constitution of the United States thus recognizes evolution, specially the evolution of itself.

4. Just in this process of itself, reproducing both State and itself, the Constitution asserts its

own highest authority as "the supreme Law of the land," which both State and People are to obey, till the latter change it by constitutional procedure. Moreover, every judge and other official must know it and be bound by it primarily; not merely by way of authority, but he must possess it originally and be filled with its spirit. Hence all legislators, executive officers and judges, both State and National, are sworn "to support this Constitution" in the first instance, so that every individual engaged in the service of the government from the President down must take this instrument as his official soul and reproduce it in his official conduct.

5. But not only every official but also every citizen as citizen must reproduce this Constitution in mind and act — which he did once when he ratified it by his vote, and which he does later by his vote for Statehood. And so the People must continue to take it into themselves and make it a part of themselves through working it (for they are the final power) and through consciously knowing it. Ratification means the adoption and reproduction of it in the soul and conscience of the People, which is indeed the final reproduction of it. And they must continue to will its existence by their suffrages at recurring periods. Thus the People pulse into the Constitution its life-blood, reproducing it perpetually and giving to it their own vitality.

The result is, the People habitually argue constitutional questions. The platform of every political party brings up points in the interpretation of the Constitution. The enemy of slavery had to make his opposition constitutional; so he sought to keep the slave out of the Territories through Congress. The policy may be moral and expedient; but the further test rises: Is it constitutional? On account of this training the American People have obtained a remarkable knowledge of their fundamental Law, which has indeed become a distinctive element of their character.

Thus we shall find underlying this Third Division the idea of Reproduction. In one way or other it calls for or calls forth *the reproductive process of the constitutional Union or State of States*. The Original Thirteen in convention assembled produced a new kind of State, the Federal Union or State of States, whose function is here seen to be the reproducing of the Single-State, the Union and Constitution. In never-ceasing activity this process is going on, giving life to the vast political organism. Thus the old Thirteen States, through the one general State, have become generative of many new States; or the original States in forming the Union, made themselves originative.

The citizen who is born into the State finds it already made; he has never given his vote or

consent to Statehood. Three generations and more have passed in the old States since the adoption of the Constitution; how is this binding on the present generation? They give their ballots according to the prescribed law; this act is a tacit acceptance. But if a sufficient number of States wish to change this first adoption of the Constitution, the latter permits them, and even helps them by pointing out the way. So the new States in their turn can reproduce Constitution and Union.

The individual State, during and after the Revolutionary War, asserted its individuality with a vengeance. It often showed itself capricious, arbitrary, tyrannical to other States, and the prospect was good for another congeries like the warring or mutually grinding European Single-States. But the old Thirteen (or rather Twelve, Rhode Island held aloof from the Convention) took the great new political step and transformed themselves from individual States into a universal State or a decided approach thereto. This will be a new form of Will actualized, not as the Single-State, European or American, which seeks to dominate other and weaker States in its own interest or ambition, but as the universal State which guarantees freedom and equal right to the several States, and will, moreover, compel each Single-State to drop its State selfishness and to recognize State

selfhood, and thereby become altruistic or other-regarding in its relations to its neighbor States.

Such are the leading points as well as the fundamental thought of this Third Division of the Constitution. Evidently here is a return to the Single-State which originally produced the Union; but the latter now goes back and reproduces its source, namely the Single-State as producing the Union. We may say that in this Third Division the Constitution returns to the Preamble and establishes "a more perfect Union" by making the latter reproductive of what created it, by making it originate its own origination as the continuous fundamental process of its existence. Thus the cycle is rounded; the Union as State-created, must in its very essence create the State, and thereby become truly independent and internally complete, being endowed with the creativity of its origin. And still further, this newly created State being also endowed with the creativity of its origin, will be able to reproduce its sources in the Union and Constitution.

If this be the general idea of the present Division of the Constitution we may next ask: What is its inner movement? Already we have given the leading topics of its four Articles; but we have learned not to be satisfied with a mere statement of items in separation. We long for the process. This can only be formulated adequately after a discussion of the contents; but

we may give a brief outline in advance as follows: —

I. The Constitution as State-producing prescribes the recognition of each State (with its citizens) by the other States (with their citizens), thus forming and vitalizing the Society of States in mutual service and in mutual equality.

II. The Constitution as State-producing prescribes the actual reproduction of the individual State, making the same a recognized member of Society of States already existent.

III. The Constitution as State-producing prescribes the reproduction of itself through the Society of States in co-operation with the National Legislature and with the People. Thus the Constitution as State-producing becomes in the end State-produced, therein going back to its origin. That which prescribes to State and People, must at last be prescribed by State and People, to the end of freedom being attained through the Institution.

It is evident that we here have the self-returning process which has been repeatedly noticed before as the inner creative movement of the Constitution as a whole and in its details. The Constitution in the first stage above given produced the Society of States which turn about in the last stage and reproduce it, of course through itself, through its own prescribed method. The Constitution thus goes back to the Single-State

and to the People, and gets itself re-enacted and revived from its creative fountain head. It, too, is therefore in the great evolutionary process; the same we saw to be the case with the threefold Powers of Government, legislative, executive, and judicial, all of which were created by the Constitution.

Tracing the correspondence still further, we notice that each of these Powers has within itself a threefold process, the last stage of which represented the new incoming element, or the new Apportionment of new Areas continually rising. The present third Division of the total Constitution has an analogous character, being a new ordering and apportioning of a new world of States which had no existence at the time of the adoption of the Constitution except as unorganized wild territory, much of which did not even belong to the United States. Thus the Constitution as State-producing has its stage of outer territorial apportionment of new State-Areas, as well as an inner apportionment of political functions. Specially through this Third Division of the Constitution the Union-producing States become the States-producing Union, the truly creative State of States, whose final purpose is always to reach down to the individual and secure his Free-Will through the Institution. Even the individual State, as well as the individual person, is institutionalized through the Union.

In this connection it may be mentioned that the very idea of *general government* means originally State-producing. *General* is connected with *genus* and *genetic* and *generative*, and thus suggests a creative principle in the government so designated, though this significance of the term, it must be confessed, is ordinarily quite obscured if not wholly lost. We may be permitted, however, to freshen a worn word by going back to its origin in the first human conception of it, and to see it again arising fresh from its primal fountain, quite as we are seeking to do with this Constitution.

As already stated, the present Division (Third) is composed of four Articles, which at a glance are seen not to have the order and symmetry of the preceding three Articles. The structure of the whole is looser and more irregular; there is not the same nice adjustment of thought with its gradations in Article, Section, Clause, though these forms are still employed. The reason of this difference we have already pointed out to lie in the subject, which was properly an outlook upon what was to come, and could not be very precise or very detailed in its organization.

Beginning with the Fourth Article and considering it as a whole the reader will note that its contents have a good deal of variety. It has not the obvious concentration which we find in the three previous Articles, each of which re-

volves around a distinct topic. There is a manifest reaching-forth into a new field, an attempt to embrace and partly to organize the vast domain of the future. The previous three Articles rather looked backward to the old Thirteen States; this Article (and the following ones too) look forward to States yet unborn, to the grand possibility of the Nation. Hence we cannot expect so much definiteness and order as before.

Still, in spite of this diversity, the careful reader, glancing beneath the surface, will find an underlying thread connecting the whole Article together. First the Constitution commands the equality of the States; each State must recognize the other as itself. Secondly the Constitution commands the equality of the citizen; each State must recognize and secure the free citizen moving into its borders from another State as fully as it does its own citizen. Having thus secured the two equalities, that of the State and that of the citizen, the present Article then turns to a new object: the Reproduction of the State, which is to be accomplished through the co-working of the United-States above and the free citizen below. The unoccupied territory being laid out and prepared by the former, the latter moves in and builds up the State for entrance into the Union, which returns and secures afresh the equality of the State and the citizen, thereby establishing a republican form of government, that

is, reproducing an image of itself in the Constitution of the new State.

The most distinctive thing, doubtless, in this Article is the Reproduction of the State, which has been the chief phenomenon of the country since the adoption of the Constitution. The procreation of the multitude of commonwealths, children of the Union through the original Thirteen States, has been the event which, more than any other, has produced the Nation. Still there is also in the present Article the mutual recognition of the already existent States, which must naturally precede the reproduction of the new State. Accordingly there are two main portions of this Article, which are also two stages in the general movement of the Third Division of the Constitution now before us.

I. RECOGNITION of one State by another is manifested by giving "full faith and credit" to the official acts of the State so recognized, in its legislative, executive and judicial capacity. Each State has its own threefold governmental process, which is accepted as valid in all its stages by the other States. To discredit such a process would be to discredit the very function of the State, and would react upon the Constitution which guarantees a republican form of government to each State. So we start with the First Section under this head.

ARTICLE IV. — SECTION 1.

Cl. 1. Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

As every State has its own proceedings and records, it is to be fully recognized in such capacity by the other States. This Section works like a prohibition by the Constitution of the United-States; each State is prohibited from discrediting the public acts of every other State, but must treat it as an equal. The equality of the States is thus enforced by the supreme authority of the land.

It is a new step in the development of the State when it abandons the idea of dominating other States through superior power. As the man recognizes his neighbor to have the same rights he has, to have the same common Selfhood, so this recognition is carried up into the associated States, each of which recognizes its neighbor to have the same common Statehood it has. If a State should assail a State, it would be assailing itself. Such a consciousness can at once dispense with standing armies, as there is no use for them. Illinois wills the Statehood of Missouri as fully as it does its own. Conquest is not thought of when each regards the other as itself.

Moreover this recognition is not simply left to the inclination of the State whether it will or will not. It *must* recognize — which fact is the highest law of the land. Under the Confederation there was no such final command over the Single-State, but this recognition remained a mere disposition or request.

It should be added that if any State is careless or inadequate in its judicial proceedings or its public acts, there will be a strong influence from other States to make it correct its shortcomings. Largely, though not wholly from such influence, some States have modified their divorce laws. Thus the whole Union helps rectify the inferior tone of certain parts.

Nor must the fact be omitted that a few States have lowered their legal character to attract certain kinds of business which could not exist in other States of a higher tone. One little State has actually solicited corporations to come under its wing for protection in order to escape taxation and responsibility to law in other States. So there is a negative element in this very recognition of each State by all, which may yet have to be rectified by putting some limitations upon it. Perhaps this may be done by Congress, which can prescribe not only “the manner” in which such acts of the State shall be authenticated, but also “the effect thereof.”

In general, the present Article, enforcing State recognition, affirms State equality from the supreme authority, which, however, springs from the States and ultimately is the command of the People.

We should also consider that each State in recognizing reproduces ideally the other State and States, willing their Statehood as one with its own, accepting their public acts as its own. So the fact of recognition in the present Section is seen to have an inner relation to the reproductive principle running through and uniting together in one general thought this whole Third Division of the Constitution, which, as already often said, is the State-producing portion of the instrument.

Plainly the Constitution has a prescriptive element which it exerts over the Single-States, enforcing among them reciprocal recognition and equality. Thus the Single-State is not suffered to be capricious or arbitrary toward its fellow States, it is made institutional through the supreme Law, which it (like any other individual) must obey.

But now we are to move forward into the fundamental purpose of this sovereign authority of the Union. In the next Section the Constitution reaches down to the individual citizen with the design of making him more adequately a free man in a free world, a world willing his

freedom. The whole complex organism of the duplicated government, the United-States and the Single-State, has as its ultimate end the securing of Free-Will. To such an object, however, there will be one shrill exception, which still makes the reader shiver with its dissonance and with its bloody consequences.

ARTICLE IV. — SECTION 2.

Cl. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Cl. 2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Cl. 3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party, to whom such service or labor may be due.

We should first observe that each of the three Clauses of the present Section contains a command to the Single-State, and each has reference to each of three different classes of persons. These classes may be designated as follows: first, the free positive individual (citizen); secondly, the free but negative individual (criminal); and, thirdly, the enslaved individual (of a different race from the free citizen). As the previous Section pertained to equality of the States, so

this Section pertains to the equality of the citizen in the several States and the limits upon that equality. This the free individual is able to take away from himself through his own deed, in case of crime; but the African slave without any fault of his own is condemned to the most complete political inequality.

As the previous Section assumed the existence of the Single-State, so this Section assumes the existence of the citizen, and does not undertake specifically to define him. This was the business of the Single-State, till the Fourteenth Amendment appeared, which declares: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Previous to this Amendment, citizenship was determined by the Single-State; but at present it is settled by the United-States and its Constitution, to which the allegiance of the citizen is now primarily due, and not to the Single-State.

Such was the new conception of citizenship springing out of the Civil War. Many Southerners who believed in the Union, yea who believed that there was no good reason for secession, deemed that their allegiance was due to their State first of all, and if it seceded, they had to follow. And the old Constitution did presuppose a citizenship fixed by the Single-State. But

the Fourteenth Amendment just reverses the situation in this matter. Now "every person born or naturalized in the United States" is a citizen first of the United States, and then of the Single-State — not first of the Single-State and then of the United-States.

A mighty step forward is this, making citizenship national and not local, also making it universal, for mark the words "*all* persons." More deeply still, this is a result of the new States in the Mississippi Valley, which are really children of the Union, of the Nation, and so look to it as their origin — the origin both of the Single-State and hence of its citizenship. But the old Thirteen had their citizens before the adoption of the Constitution, and so they all, both Northern and Southern, had to be reconstructed in this respect, and wheeled into the line of nationality by the actual sons of the Nation, who find expression in the Fourteenth Amendment.

(1) The *First Clause* takes for granted the citizen, who is indeed already existent in the Single-State, but is now to obtain another citizenship in addition to the one he already possesses, namely the citizenship of the United-States, which here gives its command. This is that any citizen of any State, on going into another State shall have the same rights and immunities as the citizens of the latter State. The Single-State is here ordered to recognize him, as it

recognizes its own. He must, however, live according to the laws of the State he enters, not of the State he leaves. Thus we see a recognition of the equality of citizenship throughout the Union.

Underneath this Clause is couched another right, more fully developed in the United-States than anywhere else: we may call it the right of individual migration. Formerly the whole Community or the whole Tribe had to move together and to conquer their new seats, if there was to be any migration. If the individual left his native abode, he was an outcast or at least a wanderer, till he returned to his original place in his community. He was almost rightless except at home. But the American citizen is everywhere equally at home in the vast area of his country, and not only his civil rights (as protection of person and property) but also his political rights (as the right of sharing in the government) are guaranteed to him by the Constitution.

Very considerable is this stride in advance of the citizenship of the old world. The individual man as citizen can now migrate from his native patch and find everywhere a house already built to receive him and welcoming him to enter and take possession. That is, an institutional house ready-made, not the material house, which, however, he will proceed to build with tremendous energy,

for he knows it will be his own, being assured therein by the whole power of the Single-State and of the United-States. This right of individual migration must first be distinctly announced in the supreme law of the land ere those countless waves of immigrants will begin to roll over the Alleghanies and cover the Mississippi Valley, making its vast area bloom in cultivation with a speed and energy unparalleled in the history of the world. Who did it? Undoubtedly the individual citizen was the visible worker with his stalwart right arm, but back of him stood the Institution, the Big Giant, helping him and securing to him his Free-Will, confirming to him all the fruits of his free activity. Individuality acquires a strength hundredfold by being institutionalized; alone by itself, without its mighty brother, the Institution, it is rather a puny thing. Its greatest product is always its institutional product.

Such was the Clause and such was its general effect. But there were exceptions. There were Communities and even States in which the migrating citizen did not enjoy "all the privileges and immunities of the citizens in the several States." His person and property were not always secured, and in the South before the war there was no free discussion of their great local question, slavery. Emigration, not only foreign but native, turned aside from such places, in its

greatest currents. Thus the Union as State-producing wrought with less force South than North—a fact productive of great results in the future.

(2) The *Second Clause* deals with the citizen (or person) on his negative side, as a violator of law, when he escapes from one State into another. Here again is the recognition of the State by the State, and over both stands the United-States with its authority. No State can pursue an offender into another State without the consent of the latter, which, however, has to be given on proper application. The fugitive from justice is to be returned to the State having jurisdiction of the crime. It is so easy to pass from one State to another that the ground of this Clause is apparent. The right of free migration, without passes, offers such a cover to the criminal escaping that the State to which he flees must give speedy help in the interest of justice.

The person endowed with Free-Will can employ it negatively, that is, for the destruction of Free-Will. This brings him into direct conflict with the State, whose supreme function is to secure Free-Will. Thus the two, the negative individual and the State, lock horns, since if the former has his way, the latter must quit business. So the State is to negate this negative person, and here enters what we have elsewhere called the negativity of the State. Actualized Will

through its law must undo or void a Free-Will which has become destructive of Free-Will.

(3) Now comes a Clause, the third, which has probably given more trouble than any other in the Constitution. It speaks of a "person held to service or labor," and means the slave, though the word slave is not found in the Constitution. An apprentice might be included in the designation, though the Constitution hardly intended to deal with apprentices. The bitter fact is that each State is compelled to recognize the slave of other States, and to deliver him up on the claim of the party owning him. This Clause was supplemented by two enactments of Congress, that of 1793 and that of 1850, the last of which was specially offensive to the non-slaveholding States. The officer or commissioner might order any citizen to assist in returning a fugitive slave — an act most repugnant to the conscience of many citizens. Any person hindering such return might be fined a thousand dollars and sent to prison for six months. Thus the citizen of the free State was by law made a slave-catcher for the Southern slave-holder. The impolicy of such an act for its supposed beneficiaries seems now plain enough.

With the Fugitive Slave Law of 1850 began the three great legal battles which led up to the actual war, every one of them being victories for the South. The repeal of the Missouri Com-

promise in 1854 gave life to the Republican Party; the Dred Scott decision by the Supreme Court declared that Compromise unconstitutional in the first place, and also declared that "a free negro of the African race whose ancestors were brought to this country as slaves, is not a citizen in the meaning of the Constitution." Thus the ancestor, black, stolen, and sold into slavery; for none of which things he was to blame, transmitted his curse to his posterity through the Constitution of the United States. The removal of this curse became in time a national object, and is recorded in the Thirteenth Amendment.

But such is the tremendous exception to universal citizenship; there are human beings who are not, and seemingly never can become citizens of the United States, being incapacitated by birth and race. Nature puts up her bar, and the Constitution is made to assert Naturism. The African is by Nature rightless; he, though free, cannot participate in free institutions. Such is the warring dualism which is brought into our instrument, and which, true to its character, will beget war.

Thus the Constitution has a decided element of Naturism, though remarkably free from Nativism. The distinction should be noticed. The man of the same race, though born in a foreign land, can be naturalized, or be transformed into a citizen; but the man of a different

race though born in the country and sprung of native-born ancestors, cannot attain to citizenship. Thus the racial limit includes the alien and excludes the native.

How the People will be brought to change all this is a mighty chapter in the history of the country. A second part will be added to the Constitution which will break down this exclusive Naturism as effectually as the first part broke down an exclusive Nativism.

Still the important principle of Recognition is here declared, and directly prescribed by the Constitution to the Single-States. The deeper reason we must see: all have republican governments, have the same type of Constitution with its triple Powers; any act discrediting such a State would be a disparagement of republican government generally. Through the one blow all would be struck, including the State which strikes; assailing a republican form, it would assail its own fundamental nature.

Such is the idea of political Recognition here asserted, which is of three sorts: that of the State by the State, that of the citizen by the State, and that of the State by the citizen (the latter is not expressly declared in the instrument, but it is implied).

But the Union has not only to secure the equality of States already existent, but also has to generate the new State and make it an equal

member in the Society of the old States. This brings us to the second portion of the present Article (Fourth), which is also the second portion of this Third Division of the Constitution. So now we have

II. REPRODUCTION of new States out of territories, which process is briefly given in the following Sections (Third and Fourth).

When the War of Independence was concluded, the question arose about the disposition of the Western Territories extending to the Mississippi. Various tracts were claimed by some of the old States, but they all at last ceded their claims to the central government. Then came the purchase of Louisiana and also that of Florida; later Texas was annexed, and other territory was purchased from Mexico. Over this vast domain the United-States has extended its State-producing power with the result that the new States are more than twice the old ones in number. Astonishingly brief are the words of this brief Constitution, which have had such a creative effect.

The division between the Free States and the Slave States will perpetuate itself out of the Constitution, and will extend into the new incoming States. Both sides thus reproduce themselves along their dividing line to the Mississippi River, on the whole with mutual peace. But both sides cross the great River, and there the burning question rises: Which

kind of State, Slave or Free, shall be the State-producing principle in this vast new territory? On this question the two sides grapple and come to actual battle on the plains of Kansas, which at last involves the whole country. So we have in this Third Section the germ of much future History.

ARTICLE IV.—SECTION 3.

Cl. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

Cl. 2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

If the last Section in its last Clause was the most backward, re-actionary, and un-American spot in the Constitution, the first Clause of this Section makes up the deficiency, since it is the most advanced and distinctly epoch-making utterance in the instrument. Here lies the State-producing principle, very succinct and even insufficient in its formulation, still it is the germ of the coming Nation.

The Union has made all citizens the citizens of all the States and of itself (with the exceptions

before indicated). But now it is to advance to the Reproduction of the State, not fully conscious of such a purport at first, but gradually getting aware of its supreme destiny. The old States, or most of them, sought at the start to hold the new territory of the West in a kind of provincial dependence. It took some time and trouble to make them relax their grip, though this was quite the same principle on which they had fought the mother-country. But when they became mother-country in turn, they likewise were ready to play the part of Great Britain on their own behalf against their political progeny. Still at last they all gave up their claims to special sovereignty in favor of the United-States as the general sovereign of the rising West, which was to be transformed into equal States.

So in the Constitution at its formation lies this grand possibility of the birth of States. And in general outside of what it establishes and what it prohibits hovers a world of potentiality, which is to be realized by the Constitution in the future, manifesting in its movement great positive and also great negative energies, such as it has shown in the past.

In *Clause First* we read the significant words: "New States *may* be admitted into the Union," not *must* be; on neither side is there to be any compulsion. The act is to be voluntary on part of the Union and on part of the territory; that

is, it must be a willing of Free-Will on each side. The limitations given in the rest of the Clause have the same general meaning. We should here recall the ultimate end of the State, which, as actualized Will, is to affirm Free-Will through the Law and Constitution.

The power of Congress over the territories is declared in *Clause Second*. A Territory of the United-States is a potential State, which has to become a real State through its own act as well as that of the Union. There is no Territory belonging to the United-States which has not an outlook upon Statehood, that is, which has not the potential element just mentioned. Its destiny is to be a member of the Society of States, being endowed with their equality and sharing in the State-producing power of the total Union. It can remain potential, if it so chooses, and Congress can keep it in that condition; but such acts, if made permanent, would violate the highest object of the Constitution, which is to establish the State-producing Union and keep it going.

Nor is a State compelled to remain a State; it can refuse to be a member of the Society of States, and can revert to being a Territory. The Constitution does not recognize a State out of the Union or a State leaving the Union. Though it cease its political functions as one of the United States, its territory remains in the na-

tional domain. It is true that the old States were not Territories when they formed the Union, but the new States were, and have herein determined anew the theory of the Union. Upon this theory the Civil War was fought by the North.

The United-States having gotten and prepared the Territory for settlement, the next great fact is the settlers, who come flocking by thousands into the new lands. We have already noticed that owing to the recognition of the citizen everywhere, he migrates with the certainty of finding political equality in his new home. The individual acting from his own inner motive, takes the initiative, and moves West from his old State, as a person, not as a member of a tribe or nation, or even of a Village Community, as was the case in the great Teutonic migrations of European History. Here the self-determining individual is the unit of movement and of civilization; though alone he bears with himself ideally his fundamental Institution which is the State and the Union, both of which he begins to make actual wherever he settles.

So he reproduces the Single-State, which, however, is required to be of a certain pattern by the Constitution before it can become a member of the Society of States. Here is the requirement:

ARTICLE IV. — SECTION 4.

Cl. 1. The United States shall guaranty to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence.

This guarantee of a “republican form of government” means that every State must be in essence what the Union is, which is republican in governmental form. Such can only be the purport of the term. The Single-State must mirror the idea of the Whole in its organization, thus it becomes a spiritual member of the Whole. Its Constitution will be like the type, being made after the image of the parent. Thus each State is ideally the entire Union and contains its constitutional process, its threefold Powers, also in a written Constitution. So the central soul (the all-soul of the Union) has repeated and reproduced itself in the single soul of the State. In such fashion we may now and then be permitted to break out of the desiccated legal nomenclature of interpreting the Constitution, and seek to make it live anew in our own souls by a psychical speech going back to the fountain-head of all Institutions. We can likewise say that the State has a Constitution with legislative, executive and judicial Powers in conformity to the Constitution of the Union. That is simple legal phraseology and has its place, but it does not

somehow open up the inner sources of this grand appearance in the Constitution.

With this Fourth Section the Reproduction of the Single-State as actual concludes, having given a brief but very suggestive outlook upon national futurity. The new States rising into view will have a new character, they will really make the new nationality. The old Thirteen were children of England and of Europe; they are so still in many respects, being not yet fully made over. But the new States of the West are children of the Union, they have no other parent to love, and hence comes their single-hearted devotion to that parent, so strongly shown during the civil war even in the new States of the South.

Thus we must take into account another division of the States, those of East and West, of the sea-coast and the river-valley, of the makers of the Union born abroad and the offspring of the Union born at home. The latitudinal division between North and South, so emphatically marked in the Constitution, is destined to yield in importance to the longitudinal division between East and West, which is in the deepest sense the division between the Old and the New. In fact, that latitudinal division, when it threatens to become a line dividing the Union, will be obliterated from the map and from the Constitution, through the victorious West sweeping in battle around to the East.

The people of the old States have been on the soil of their ancestors for several generations; they have, therefore, a local pride which goes out to their State, and even to their little town. But the new States of the West are inhabited by people (or by their descendants) who left their State and its local feeling behind; often they have removed a second time from one State to another, the newer generation seeking the newer State still farther in the West. But everywhere the emigrant found the Union which had gone in advance and prepared for him the new home. So he knew and loved the Union better than he did the State, while the inhabitant of the old Thirteen knew and loved the State better than he did the Union, and before he did the Union. This was as true of the North as of the South, and is as true to-day of Massachusetts as of Virginia.

Now there is much to be learned of antiquity, and much to be commended in old attachments. But the point at present is to see the special kinds of character evolved from the preceding circumstances, and to observe their historic consequences. The old Thirteen were the makers of the Union, by mutual agreement, and they might well think that they could unmake it by mutual agreement. But the Union brought forth a numerous and courageous offspring, the new States, who did not propose to let the source

of their existence perish without a struggle. In the civil war this difference between the old and the new States came to the surface in the most emphatic fashion, namely in deeds.

The new States have become State-creating in the Union along with the old States, and so have a double quality, created and creating in one. Produced by the Union, yet also producing the Union, the new State of the West revealed the ground-tone of its character when tested by the fiery ordeal of war. In the Northern division of the new States there was an essential unity, but in the Southern division of the new States the wrench of separation tore them into two hostile parties (Union and Secession), and also into two opposing sections (Border States and Gulf States). This inherent unity of character in the new States of the North, springing from their origin in the Union, is what chiefly saved the parent, saved the Union from its own primal dualism, the latitudinal, which was temporarily patched up but not healed by the Constitutional Convention.

In the history of the country we may notice three dualistic tendencies:—

1st. The dualism between small and large States; settled apparently for all time by the Constitution.

2nd. The dualism between Free and Slave States, or North and South; compromised by

the Constitution, but settled by the Civil War (latitudinal division).

3rd. The dualism between East and West; this made itself decidedly known during the Civil War, but belongs to the Future (the longitudinal division).

At this point we bring to a conclusion the discussion of the Fourth Article of the Constitution with its four Sections, which contain, in our opinion, two leading sub-divisions of the total Third Division of the Constitution. The reader must have long since discovered that we are seeking to organize this instrument, and are not simply throwing out disconnected observations upon its text. We hope, therefore, that he will still be able to accompany us in good spirits to the next leading sub-division, which is the third organic portion of this Third Division, and embraces all the rest of the Articles to the end (Fifth, Sixth and Seventh). Let him also notice (for it belongs to the full comprehension of the subject) the diminishing symmetry in the order of the instrument.

III. REPRODUCTION of the Constitution is the final theme of the Constitution and the natural rounding out of its spiritual organism. This is now seen to have a continuous returning into itself, whereby it may be said to become conscious of itself (like the Ego whence it sprang), and to be endowed with speech, which prescribes

within itself its own eternal self-renewing act. That which stands behind and reproduces the Single-State and the Union, namely the Constitution, is itself to be reproduced through itself in the Constitutional Word, the sign of self-conscious Reason. Thus the Constitution which has already commanded the Recognition of the State by the State, and also the Reproduction of the State, in the two foregoing sub-divisions, now recognizes itself as the reproductive principle which is likewise to reproduce itself. Thereby it turns its own inherent power back upon itself, and becomes self-reproductive, universalizes itself in act, and reproduces itself as reproducer.

Such is, in brief general terms, the reflective or self-returning stage in this third movement of the Constitution, which shows itself under several forms in what follows.

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States shall call a convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided, that no Amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State without its consent, shall be deprived of its equal suffrage in the Senate.

This is the sole Article of the Constitution which stands by itself without Section or Clause. The last Article (VII) indeed has no Section or Clause, but it was only a temporary addition whose force expired with the adoption of the Constitution. Moreover it was simply an application of the present Article to one occasion, the nine States required being three-fourths of the States present in the Constitutional Convention.

Thus it seems to rise up singly and thereby receive a special emphasis. It is on one subject and in one sentence substantially, the longest in the instrument with a single exception possibly, and the most complex.

Its theme is what we may call the Reproduction of the Constitution; it declares the same to be a self-changing, self-generating, self-renewing instrument, to be in a condition of self-evolution. The Constitution is the most stable element of our government, yet it is not crystallized; though formed, it is still formable; yea, it can transform itself and tells the way in this Article. So the States and the People can reproduce their Constitution constitutionally, bringing it back to be re-created at its original fountain-head.

Hitherto in the first three Articles it seemed the absolutely fixed and rigid, the law behind all laws, to which the latter must conform, the immutable essence of all legality. But now its

aspect changes, that first rigidity becomes flexibility to the Will of the People, and we witness its inner power of adjustment to the spirit of the time, which is evolutionary, not revolutionary. The Constitution recognizes the evolution of the Constitution, and thus deeply unites itself with the on-going process of the ages. Besides, in this recognition of its own profoundest fact, it shows itself to be self-conscious, knows itself to be in the line of never-ceasing development. Accordingly it is ready to accept the fact of its own progress, and proposes here to take the same into itself, making it a permanent part of itself. Thus our Constitution embodies the eternal in the changeable, and reveals its eternal truth and everlastingness in acknowledging its own mutability.

Herein lies the solvent of all revolution in government, which it is no longer necessary to overturn by violence. The People have it in their power to alter, even to destroy their Constitution in peace. This is not altogether "an indestructible Union of indestructible States." If the Will of the People gets completely negative to the State — a condition conceivable, but hardly possible — then it may show itself able to commit suicide. But as long as the People remains institutional, and wills freedom through an established order, there will be no need of a revolution for the purpose of changing even the

fundamental Law, and thereby embodying the new idea. This Article puts revolution into the Constitution and thus makes it evolution.

The framers of the Constitution had all taken part in the War of the Revolution so-called, which gave birth to the Nation by separating it from Great Britain. Thus the new idea in its new world had been born in battle; but how can it be born in peace? For born it must be somehow, just that being the real function of History. The mother-country obstinately refused to change her Law to suit the new birth of time, and so her Colonies revolted. And now will they not take the lesson when their turn comes? They did take the lesson, rather the deepest of the period, and transformed the bloody Revolution of War into the constitutional Evolution of Peace. It was, indeed, a noble spectacle; the men of the Revolution, headed by George Washington, making Revolution unnecessary, if not impossible.

Still they did not banish War. The step was really in advance of the People as a whole, and the matter will have to be settled in battle again. A minority of States will refuse to obey the command embodied in this Article, and the conflict opens through which, in strange contradiction, the peaceful evolution of the Constitution has to be re-affirmed and re-enacted by War. But this second time Revolution did not succeed,

the separation did not take place, and so we now live under a fresh confirmation and rejuvenescence of the present Article, which through the last three Amendments, has found new life and new application in the Reproduction of the Constitution.

Looking into the complexities of the present Article we find that it indicates two ways of proposing Amendments and two ways of ratifying the same.

First as to the proposing of amendments: —

I. Congress may by a two-thirds vote in each House propose an Amendment.

II. The Legislatures of two-thirds of the States may apply to Congress to call a Convention of all the States (similar to the first Constitutional Convention) for the purpose of proposing Amendments.

Here are seen two initiatives, the new way (through Congress) and the old way (through the States). Thus each side of the duplicated government can make a start. Another instance showing the two forces in the Convention, Union-ward and State-ward. In the second case Congress had to obey the request of the States.

Now we may glance at the two ways of ratifying the Amendments proposed in either of the two previous ways.

(A) Three-fourths of the Legislatures of the several States.

(B) Three-fourths of the Conventions of the several States.

Here again are the old way and the new way of ratification, the former being the method of ratifying the work of the first constitutional Convention. Which of the two methods is to be employed, is determined by Congress.

It is evident from this tabular statement that there are four processes of enacting an Amendment to the Constitution of the United States.

(I. A.) Two-thirds of Congress proposing, three-fourths of the Legislatures ratifying.

(I. B.) Two-thirds of Congress proposing, three-fourths of the Conventions ratifying.

(II. A.) Two-thirds of the Legislatures proposing, three-fourths of the Legislatures ratifying.

(II. B.) Two-thirds of the Legislatures proposing, three-fourths of the Conventions ratifying.

The last two processes take place through the medium of Congress, which, however, has but one little choice in the business.

The fact is that only one of the four methods has been used as yet, that is the first (I, A). The Convention both for proposing and ratifying amendments has been deemed too cumbrous, or unnecessarily democratic; the will of this People can be just as well expressed through the established channels, the National and State Legislatures. To be sure, if the whole Constitution

were to be thrown afresh into the melting-pot, and recast as a totality, the Convention would probably be again demanded. So we still have constitutional Conventions in the States, specially elected by the People for the purpose of making a new Constitution in its entirety. Still further, the State Legislatures form not a good initiative for a combined effort of the States, especially when two-thirds are required, as they are widely scattered. Congress is the better starting-point, being one body assembled in one place. So the method has been in the line of least resistance — two-thirds of Congress proposing and three-fourths of the Legislatures ratifying (I, A).

The question has often arisen: Has not this one line of least resistance still too much resistance against the true spirit of progress? Is it not too inflexible for the right Evolution of the Constitution? In other words, is not the process of Amendment made too difficult by the present Article? Many hostile critics have declared so with bitterness; not a few friendly critics have uttered the same opinion without bitterness. Particularly English writers, discerning judges and by no means antagonistic, yet with a natural bias in favor of their own Constitution, have laid their finger of disapproval upon this Article.

According to the English Constitution Parliament is omnipotent and not the Constitution; hence in the American sense it is not a Constitu-

tion at all, whose essence lies in its supremacy. According to Mr. Bryce, the British Parliament is legally competent to divide up England into many kingdoms and restore the Saxon Heptarchy. Parliament could constitutionally repeal Magna Charta, and yet the act would be in a sense unconstitutional and so regarded probably by a majority of the English People. How can we square this contradiction with any rational view of the subject? For the English Constitution is alive, no doubt of it, and makes itself felt. Our solution of the riddle is that the English Constitution is not yet born; it has its secret throbbings and pulsings, nay its rights which cannot be violated without the penalty. Let Parliament dare repeal Magna Charta — what a kicking and gyrating of the unborn infant throughout all England! The members of Parliament who would pass such an act, though it be perfectly constitutional, had better be dead; for that unseen unborn Constitution would certainly rise not from its tomb but from its womb against their deed. And now lean Jonathan who has given birth to his Constitution, cannot help predicting that big Johnny Bull will some day be compelled to have the Cesarean operation performed upon him if that unborn Constitution of his does not somehow get itself born, so that the People, English and all others, may see it in the light of day and be able consciously to profit by its excellences.

It should be remembered that beside the National Constitution, there are many State Constitutions, and in these lie the power and need of frequent change. They embody many details which are variable with time; they usually are of greater length than the brief National Constitution, which seeks to give only what is enduring and fundamental. Most of the Southern and Western States have had several Constitutions; Louisiana heads the list with seven since 1812, Georgia follows with six, Virginia with five. Illinois has had three since 1818. The New England States have made fewer new Constitutions than any other part of the country; Massachusetts is still under her Constitution of 1780, which has reached the unparalleled age of 120 years and more, though with a number of amendments. Mr. Bryce gives the number 113 as the sum total of Constitutions which have been formed since 1776 in all the States. The average life of a State Constitution is said to be about thirty years. Since the Civil War the new South and the new West have shown the greatest tendency to Constitutional change: the former to meet altered social and political conditions on account of the abolition of slavery, the latter to keep pace with economic progress and increase of population. Thus the State Constitutions have been made to reflect the more changeful portions of the country.

Now all this great variety of constitutional change, which is far more necessary to some parts of the Union than to others, could not possibly be embodied in the National Constitution. Sections of the country are very different in soil, climate, people; these differences are truly constitutional and must be mirrored in the State Constitutions. The main reason for the division into States is to allow local development throughout a vast and diverse territory. Hence the great interest of the trend of these State Constitutions; they show what may be called the divisional development of the country, rather than its unitary.

But the National Constitution must be something more universal and more permanent. If it had to embody or to constitutionalize all the fluctuations of the diverse regions of the land, it would perish of sheer mutability. Yet these diverse regions must have their special Constitutions according to their special needs, and the right of changing them with changed circumstances and new experiences.

But when we come to the Constitution of all these Constitutions, it cannot be whirled into such a vast vortex of change, local and temporary. Hence the difficulty of adding merely an amendment to the National Constitution, even when a mania of the sort has broken out, which happens sometimes. In the Forty-ninth Con-

gress (1884-6), there were forty-seven Amendments introduced, but none of them were ever proposed by Congress, let alone ratified by the States. Even the Civil War with its three Amendments made relatively little alteration in the old Constitution, and yet a little, as it ought. The Pyramids change with the thousands of years, they too are in the process though it be very slow.

So we can affirm that the National Constitution is in the grand evolution of the Ages, though it represents the permanent, the universal. The Sun, compared to the planets rapidly revolving around it, seems to stand fixed in the Heavens; yet the Sun with its whole planetary retinue is declared to be moving toward its far-off goal in Space. The Solar System of the Union has also its fixed and changeful bodies, yet the whole is marching on in its career of Evolution. Moreover it is what the Solar System is not, namely, conscious of its own evolutionary nature, and utters the same in this Fifth Article of its Constitution, which we have been considering.

Such are the two elements, the more permanent and the more changeful, represented in the double government of the United States. Both are necessary; one naturally pertains to the Nation as a whole, the other to its separate divisions as States. Still the more permanent element embodied in the National Constitution is self-renew-

ing, self-reproductive, purposely, consciously so. But it cannot take the place of the changing State Constitution without losing its character. Each kind of Constitution has its function in the total system, which is both divisional and unitary, local and general, temporary and lasting, special and universal.

With these thoughts in mind the reader can give his own answer to the much-debated question: Ought a change in the National Constitution to be rendered more easy? Should this instrument be made to respond more readily to the popular will? Ought this Article to be so amended that the People can with less effort get back into the original creative workshop of the Constitution, and alter or re-make the same!

As a rule foreign publicists, friendly and unfriendly, say Yes; with great unanimity Americans say No. In France a majority of the two Chambers voting together can amend, that is, change the Constitution. Such a country has no Constitution, not even the constitutional idea in the American sense. An English writer has called our Constitution *the dead hand* clutching the vitals of the Nation, because it cannot be altered by an act of Congress, which is not omnipotent, like Parliament.

No doubt the French and English plans are far simpler. But this is an age of complex organization, and government must respond sooner

or later. The man who can make or control the complicated organism of a great enterprise is the grand captain of the industrial realm. The People who in the interest of freedom are able to manage a Constitution with its manifold Powers and Laws, yea, two Constitutions of quite opposite kinds, each with its own varied life and order, is certain to control the world's organization in the end. The discipline given to the American citizen by his government from youth up is the most superb training in directive power that the world has yet seen. Just in this fact the public school has its present meaning, and also finds the guiding-line for its future development.

So much for the Fifth Article, in which the Constitution shows itself as changeable. This is the first or immediate stage of its Reproduction. But it is evident that with this power of change must somehow be coupled permanence; the Constitution is law, the organic Law, and so must likewise have the element of stability, and therewith of sovereignty. Also this is a part of the reproductive process of the Constitution, being opposite in a sense to the preceding principle of change, yet united with the same in a common movement. For in the governmental process stability must not shut out progress, nor progress undermine stability.

With such a thought we pass to the next Article

(the Sixth) composed of three Clauses (or Sections, as there is no second division in the present Article). It may be here noted that the designation of the divisions of the Constitution as *Article, Section, Clause*, is given in Article Fifth just considered, which fact suggests again the conscious ordering of the instrument in the mind of its makers.

The Constitution, then, in the Fifth Article, having affirmed itself as alterable through the Society of States, proceeds in the Sixth Article to affirm itself as the fixed Law over this Society of States. When the Constitution has been amended, such Amendment is the established Law for all, the supreme legal authority which the Single-State has to obey, therein really obeying itself not capriciously through itself, but institutionally through the Whole. In the Fifth Article the Society of States determines the Constitution, in the Sixth Article the Constitution determines the Society of States. In this view the Single-State cannot withdraw from the Society of States without passing from constitutional evolution to unconstitutional revolution.

ARTICLE VI.

Cl. 1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

Cl. 2. This Constitution and the laws of the United

States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

Cl. 3. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath, or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

At the first glance the three Clauses of the present Article seem rather miscellaneous and without much connection. A closer inspection shows that they hover about one fundamental thought, the universal supremacy of this Constitution. The Article begins by taking a look back at the Confederation which has just preceded it, and assumes the latter's indebtedness; then it asserts its supreme authority over the States, and finally binds every official, both of the State and the Nation, by oath to observe the Constitution, of course just in this matter of supremacy over the States. Thus in the present Article, the Constitution acknowledges a duty as well as asserts its supreme right.

1. In the *First Clause* there is an indirect reference to the Revolutionary War, since the mentioned debts and engagements were largely contracted in support of it. In one way or

other the Single States, or at least some of them, were shirking the payment of their share of the War's obligations, and the Confederation could not compel them to pay. The result was that the country stood on the verge of bankruptcy. The Constitution came to the relief of the situation specially in the present Clause, but also through the added power of taxation, which could now be enforced by the supreme authority of the United States.

Herein the Constitution seems to distinguish itself from the Confederation and to say: "I shall pay those debts of freedom which you cannot." Also we can mark the note of new authority now conscious that it can execute its command against the refractory States.

2. The words of the *Second Clause* make explicit the supremacy of the Constitution, though hitherto that supremacy has certainly been implied. It has already declared what the State cannot do, and thus asserted the power of limiting the same.

Three kinds of laws may conflict with the Constitution: (1) a law of Congress; (2) the Constitution of a State; (3) a law of the State legislature. In case of such a conflict every court, both State and National, must declare such a law unconstitutional, if the same comes before it in any legal procedure.

One State, South Carolina, has been famous

for challenging the supremacy of the general government. This State attempted nullification in 1832, and started secession in 1860. In the early period of the Government an element of disunion existed in the North also, particularly in New England.

3. It was not enough that judges should be bound by the Constitution. In this *Third Clause* all officials of the executive department, as well as the members of State and National Legislatures are required to be sworn to support the Constitution. Every person administering any of the three Powers of Government, legislative, executive, or judicial, of State or of Nation, has to pledge himself first of all to the supremacy of the Constitution.

Many questions will arise and have arisen under this Section. Is every petty official to interpret the Constitution according to his own insight? Is even the President to follow his own view of it in doubtful cases? Andrew Jackson, when President, insisted upon obeying the Constitution as he understood it, though the Supreme Court understood it differently from him. On the whole, each Power has a field of its own in the interpretation of the Constitution, which field the other Powers seldom intrude upon. The Supreme Court has itself decided not to touch political questions, and it has rarely and unwillingly decided an act of Congress unconstitu-

tional. More and more does each department (legislative, executive and judicial) find its own sphere of constitutional action. Still it remains the function of the Supreme Court to decide upon the constitutionality of an act when brought before it.

As every civil and military officer, as well as every Senator and Representative, both State and National, had to take the oath to support the Constitution, the interpretation of this third Clause acquired very great importance during the late Civil War. It is to be noticed that the oath demands loyalty to the Government, not to the king or lord, as in feudal times; the service is not personal but institutional. The English Monarch takes a coronation oath administered by the Archbishop of Canterbury, to govern "according to the statutes of Parliament, and the laws and customs" of the realm (which fact has been supposed to imply a Constitution). The officers of State take oath "to serve truly and well his majesty" — a personal or feudal oath to the sovereign, not to the State as such. Really, however, the king has to obey the ministers rather than the ministers the king. The oath originated in religion, but the employment of it as a religious test is specially prohibited in the present Clause (Third).

But the reproductive process of the Constitution will not be complete till it be taken up and

reproduced in the mind and conscience of the People, who are to ratify it externally and internally — externally by a vote of acceptance, and internally by making it a part of themselves, of their political selfhood.

ARTICLE VII.

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Here is the concluding command of the Constitution, namely that all its previous commands must be sanctioned and re-commanded by the People, who thereby are made to command themselves through the Constitution. Very important is this since it makes the People conscious that they must govern themselves, of course not immediately as a mass but by means of the organic Law. Thus the popular Will is made to will Free-Will through the Institution. Every Individual in each State is called upon to ratify — which act we may conceive as a kind of Social Contract inasmuch as all are invited to accept or to reject the written Contract named the Constitution. Yet this is very different from Rousseau's *Contrat Social*, though we may find traces of the influence of the latter. Not at the beginning of political society but rather at a very advanced stage of it can the present form of

Social Contract appear; strictly it is not a Contract at all.

With this ratifying Clause the Constitution as originally designed and written completes itself. Its direct relation, however, is to the Reproduction of the Constitution just unfolded; that is, the Constitution first reproduces itself by being made capable of change, then by establishing itself in such change, finally by reproducing itself in the act and consciousness of the People through ratification.

But the careful reader must observe that this Reproduction of the Constitution just given is but a stage (the third) of the Third Division of the total Constitution, which Division unfolds the reproductive or State-producing process of the instrument. As this part is somewhat intricate, and likewise not fully developed, we shall, at the risk of excessive iteration, recapitulate it in the following summary,

The theme of this Third Division of the Constitution is the reproductive process of the Constitutional Union or State-producing State. Its sub-divisions are as follows: —

I. The process is first given in the form of what we may in general call Recognition (Art. IV. Sects. 1 and 2): —

- (1) of State by State,
- (2) of Citizen by State,
- (3) of State by citizen.

II. The Reproduction of the State or the creation of Single-States (Art. IV. Sects. 3 and 4): —

(1) The Territory acquired and made ready for settlement,

(2) The migration of settlers to the new lands,

(3) The Territory passes into Statehood by adopting the norm of the United-States. Thus it is born and become one of the Family.

III. Reproduction of the Constitution as such, through means prescribed by itself (Art V. to the end).

(1.) The Constitution can be changed and so reproduced by the Society of Single-States (Art. V.).

(2.) The authority of the Constitution is asserted, and hence its stability as the highest law of the land till changed as above (Art. VI.).

(3.) Ratification — this is the reproduction of the Constitution in and through the People who make it their own — each voter acting for himself (Art. VII.).

So we may put together this third stage of the Third Division of the Constitution which at this point comes to its conclusion.

Throughout the preceding exposition stress has been placed upon three main things: 1st, the subject-matter of the Constitution (material); 2d, the order and symmetrical arrangement mani-

fest in the instrument (formal); 3d, the inner processes everywhere revealed in the structure, which finally reach down to the creative Self and its movement as the fundamental source of the Constitution (psychical). In the present connection the reader naturally queries, In how far were the framers conscious of their work? The psychology of it was hardly known to them, but their heads were full of the subject-matter at the start. The symmetry of it seems to have been a growth of the Convention which sat nearly four months, having organized itself May 25th, 1787, and having adjourned the following September 17th. A study of the various stages of the Convention (see *Elliot's Debates*) brings out the following facts: —

A start was made with the so-called Virginia Resolutions introduced by Edmund Randolph of Virginia outlining in fifteen successive paragraphs what the content or subject-matter of the Constitution ought to be. This brief document contains the germ of the complete Constitution as State-producing and distinctly declares and outlines the three Powers, legislative, executive and judicial. Its authorship belongs doubtless to several persons, chiefly to Madison. It was referred to the Committee of the Whole, which not long after (June 13th) reported to the Convention a series of nineteen Resolutions, not

very different in substance from the Virginia Resolutions, but showing not so good order.

Then follows a counter-plan known as the New Jersey Resolutions, nine in number, but several of them quite long, introduced June 15th, two days after the report of the Committee of the Whole. This New Jersey plan, which proposed to adopt the Articles of Confederation with some revisions, voiced the opposition of the small States which were afraid of being swallowed up by the larger States. The difficulty was finally compromised by giving to the small States equal representation in the Senate. But at first the Committee of the Whole reported against the New Jersey plan, and a long and frequently bitter discussion arose, the Convention several times being on the point of breaking up. The Virginia plan was regarded as too centralizing, and was assailed by the small States, now the warm champions of States' Rights.

After more than a month's discussion a list of twenty-three resolutions strung along in succession was given to a new committee appointed July 24th, consisting of five leading members, with orders to report a draft or form of Constitution. The Committee is known as the Committee of Detail. It worked over the previous resolutions into a new shape, and now the divisions into Article and Section appear with distinctness. But the Order in these Articles is still

quite vague; the legislative Power has seven separate Articles devoted to it, the Executive has one, and the judicial one.

This draft, being reported to the Convention, was debated with spirit for a month (August 6th is the date of the report). The result of the discussion was a feeling that the order could be improved as well as the composition; so a new Committee was appointed under the name of the Committee on Style and Arrangement (Sept. 8th). This was a very significant step in the matter of what we have called symmetry. After four days (Sept. 12th) the Committee reported the Constitution in a new draft which had the present seven Articles of the instrument arranged in the present order. This new draft was submitted to the Convention for fresh discussion and adopted with a few changes (Sept. 15th). It was signed two days later, three members refusing to affix their signatures.

Looking back to the beginning of the Convention we can see that the Virginia Resolutions contain the cream of the Constitution. But this cream had to be churned over and over for nearly four months before the finished result came to the surface. Of course additions were made from several plans placed before the Convention. The Single-State was not adequately recognized in the Virginia scheme, so this element had to be added. Still the Virginia Resolutions show

- (1) A suggestion of the Preamble;
- (2) An outline of the Three Powers, legislative, executive and judicial;

(3) A provision for the admission of new States as well as a general idea of the Third Division of the Constitution as set forth in the preceding exposition (see page 290). That is, nearly all the positive subject-matter, apart from the two great compromises, was brought to the Convention already prepared by the Virginians. Even the sequence of the Constitution shows itself in the plan—the three Divisions follow in their order, and the three Powers are given in their order also.

Still the formal symmetry and the due subordination of the parts in Article, Section, Clause, now so manifest in the finished work, had to be brought out of this first sketch by much labor and discussion. It had to pass through three successive Committees, that of the Whole, that of Detail, and that of Style; each of these Committees then heard the comments of the entire Convention on its work. A very carefully prepared instrument by the best minds of the country we see it to be, no pains being spared to bring it to both material and formal perfection.

For this excellence of form the chief credit is given to Gouverneur Morris (see preceding p. 98), a member of the Committee on Style. Says Madison who was a member of the same Com-

mittee: "The finish given to the Style and Arrangement fairly belongs to Mr. Morris. * * * A better choice could not have been made, as the performance of the task proved." Morris himself stated in a letter (Dec. 22nd, 1814), to Pickering: "The instrument was written by the fingers which now write this letter." So the throes of the Convention to express itself worthily in a Constitution brought out during the last week of the Convention the supreme man in the matter of literary style. Thus his best gift was utilized for all time, since Morris, it ought to be added, was not a far-seeing statesman. It is remembered against him that he advocated a kind of provincial dependence of the new incoming States of the West upon those of the East, and thus proposed to re-enact substantially the same cause which brought about the estrangement and then the separation of the Colonies from the Mother-country. If any such plan had been adopted and persisted in, the Civil War might have been longitudinal instead of latitudinal.

But dropping this formal element and turning back to the subject-matter, of the Constitution, we may seek whence it came. How did the Virginia Resolutions get to be? First of all, the State charters were essentially similar to the Constitution, having the three Powers and an organic Law which organized the State. Still it was an enormous stride to transfer this constitu-

tional organism from the Single-State to the United States, thus making two Governments, yet both held together harmoniously in one process, as each State is constitutionally what the other is, and what the Union is. This rise of the Constitution of the Single-State to that of the United-States was wrought out theoretically by the great political thinkers of the time, particularly by Hamilton and the Virginians, who then practically realized it in the present form. Constitutionally the Single-State produced the Union, which in turn constitutionally produces the Single-State and thus becomes the State-producing State.

Taken by itself the United-States must be grasped as an Idea; apart from the Single-State it has no permanent territory of its own except a few patches like the District of Columbia. Hitherto in the history of the world every State has had its own distinctive piece of earth, though it held sway over other countries besides its own. The Government of the United-States is an Idea, and works as an Idea; in one sense it has no land, except the so-called Territories, and these it seeks to get rid of as soon as it may; it throws off its sensuous part, as something alien to it, and will be truly general like the Idea, which finds its true counterpart in the General Government. In this sense Americans may well be called practical Idealists (two words hitherto

supposed to be absolutely contradictory) for they have to be such in order to understand and particularly in order to administer their Government. Such a discipline does it give them: first a profound belief in the Idea and secondly the ability to realize it.

The Constitution is written, which fact has likewise its precedent in the charters of the Colonies and the States. Further back, in England authors have found hints of such a Constitution in Cromwell's "Instrument of Government" (1653) and in Sir Harry Vane's proposed National Convention for making a Constitution (1656). New England investigators have found germs of a written Constitution in the Mayflower Compact (1620) and in the eleven articles of the "Fundamental Orders of Connecticut" (1639). The origin of our constitutional government has been traced not only to England, but also to Holland, even to Judea.

The Constitution, however, brings to light not only a new member of the old system of States, but a new system of States; it shows the grand transition out of the European to the Occidental State. Europe has had its own society of States from old Greece down to the present, all of which are varieties of one fundamental political genus; but the American society of States belongs to a different genus, now for first time distinctly described and ordered in the written Constitution.

This was no doubt the work of Virginians chiefly, aided by Hamilton, for whom sometimes the whole is claimed. Virginia in 1787 was the largest and most important State in the Union, and altogether the most original in political thought. It looks as if Virginia at this time was manifestly marching at the head of the World's History, as were those Athenian soldiers who twenty-four hundred years ago marched out to the field of Marathon. The movement was undoubtedly common to all the Colonies, but Virginia was the institutional leader and spokesman; she substantially made the Constitution, and brought about its adoption, chiefly through the influence of her greatest son, George Washington, President of the Convention and the Zeus Olympius of the new epoch.

Still we have to note that even now there is a deep rent in Virginia, an inner dualism, which is certain to have a future. Two of her delegates (Randolph and Mason) would not sign the finished Constitution. Her chief public men were profoundly divided between Federalism and States' Rights. After Washington, her two greatest sons, Marshall and Jefferson, furnished to a future generation the main intellectual weapons in defense of the Union and of Secession. It hated slavery, but kept the slave; it was both aristocratic and democratic; it had a strange double culture, French-Latin in some ways, and Teu-

tonic-English in others. Very decidedly did this inner contradiction come out in the crisis of 1860 when Virginia was for the Union but against its preservation. The complete outer manifestation of this internal twoness at last showed itself in two States, so that we now have two Virginias. The deep tension in her spirit finally broke her in twain, but it was one ground of her original greatness.

So much for the Convention which originated the Constitution, and for its deeper sources lying back in antecedent institutions.

OLD AMENDMENTS TO THE CONSTITUTION.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or, abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval

forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor to be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII.

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

It will be seen that the Amendments are divided into two sets or groups; those ratified before the Civil War we call the old Amendments; those after it the new. The years of ratification for them all are as follows: —

The First Ten, 1791.

The Eleventh, 1798.

The Twelfth, 1804.

These are the old Amendments; the new come more than sixty years later.

The Thirteenth, 1865.

The Fourteenth, 1868.

The Fifteenth, 1870.

This difference in time corresponds to a difference in character between the two groups.

The first group we may likewise divide into two portions. The first eleven Amendments above given belong together in form and spirit; they have a common tendency in being limitations and prohibitions upon the central government as formed by the Constitution. They show a decided reaction against the power conferred upon the Union. Herein the American People, in spite of the Revolutionary War, were still English and drew

their ideas of political freedom from English History. The New Government was regarded as a kind of Monarch with irresponsible power from whom they must wrench a Bill of Rights. They were unable to conceive themselves as the source of this terrible Government after having made it through their agents and being able to alter it when they chose. So Virginia and Massachusetts, the two oldest and largest States along with some others, insist upon a Bill of Rights being added to the Constitution.

Nothing shows more plainly than such a request from such States that the Constitution had taken a step in advance of the People, as it ought—yet not too far in advance. The Constitution had to work a little ere the People could fully see that it was a new and higher security of freedom than Europe had ever known. Many able men could not understand that a Bill of Rights appended to such an instrument was a downright absurdity.

But one man saw the full truth of this fact and stated it with precision. This was Alexander Hamilton. In the *Federalist* (No. 84) he declares that “Bills of Rights are, in their origin, stipulations between Kings and subjects” and are “reservations of rights not surrendered to the Prince.” Such was Magna Charta extorted from King John, also the Petition of Right assented to by King Charles I; “such was also

the Declaration of Right of 1688 afterward thrown into the form of an act of Parliament called the Bill of Rights." But here the People are the sovereign; they are already the source of all the rights which any bill or provision can confer. The first words of the Constitution: "We the People of the United States do ordain and establish this Constitution" is wholly inconsistent with a Bill of Rights.

Hamilton shows himself cognizant of the great change which has been made out of the British into the American Constitution. But the People must have a Bill of Rights; out of the very Government instituted to secure Free-Will, they make a goblin from which they must extort securities for Free-Will. These first ten Amendments are usually called the constitutional Bill of Rights; but as such they really discredit the Constitution itself; they imply that the People require protection against their protector, the Constitution. In it somehow or other a king must secretly lie ensconced; now let us put on our armor and be ready for him.

So the People thought; still they adopted the Constitution, showing that they were ready to take the great step in advance with a little urging. Notwithstanding, they were frightened when they took it, and at once turned round and looked back in a kind of trepidation. These early Amendments are essentially a looking back-

ward to England, especially to the Revolution of 1688. Really the American People had crossed a new Ocean wider than the Atlantic, they had made the transition from the European to the Occidental State, from the old Nation-State to the new State-producing State. But not without reminiscences, yea, longings for that fair old world, could the work be accomplished; so let these Amendments be appended to the Constitution, outside of it and *behind* it, yet an authoritative part of it.

A large mass of Amendments from the various States came before the first Congress (1789). The sifting began; the House selected 17, the Senate reduced these to 12; the States finally adopted 10. Evidently there was the attempt to make the whole set as innocuous as possible, though Hamilton declares (*Federalist*, No. 84) that "Bills of Rights in the proposed Constitution are not only unnecessary, but would even be *dangerous*." He argues that the very denial of powers calls up "a colorable pretext to claim more than were granted." His instance is the most striking one, the liberty of the press; nothing should be said about it in the Constitution of the United States as there is nothing said about it in the Constitution of the State of New York. "Why declare that things shall not be done which there is no power to do?" Hamilton saw not only the inner

self-contradiction but the danger of prohibitions in a government of enumerated powers. Tell it what it can do, not what it cannot do — for the latter is an endless chain.

Take the first prohibition here: “Congress shall make no law respecting an establishment of religion;” unnecessary, because Congress could not make such a law anyhow, without the grant of power. But this is not all: the prohibition implies that what is not prohibited is permitted; thus it contradicts the fundamental proposition of constitutional interpretation that what is not granted is forbidden. As the first Eight Amendments contain essentially a series of prohibitions, so there must be the ninth and tenth Amendments to counteract the evil consequence of such prohibitions, namely the idea that the Government has the right to do everything which it is not prohibited from doing.

Such is the general character of this Bill of Rights appended to the Constitution. All that it provides for, had been better provided for elsewhere and by other means, or totally omitted. For instance the eighth Amendment says: no excessive bail, no excessive fines, no excessive punishments. That is, a Court of *Justice* shall not commit *injustice*. Such things had improved the Constitution by their absence; very different are they from that positive organizing character which we meet with in the instrument

proper. So the whale has to have its tub, and we need not be too strict with that baby, the People, who after having taken such a prodigious first step, must have a plaything, especially as it has such sweet memories of the old country and old times connected with it.

We have spoken of the first ten Amendments; now a word about the eleventh. It arose from Georgia, which State objected to being sued in the United States Court by a private individual. She deemed her State sovereignty to be violated by being compelled to appear in a lawsuit under such circumstances. In consequence of her agitation the present Amendment was proposed in 1794 and adopted in 1798.

Its wisdom may be doubted, it destroys the symmetrical working of the Constitution, it has protected and thus encouraged States in the repudiation of their debts. One of the less happy passages of the *Federalist* (No. 81) is where Hamilton declares that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," and applies the dictum to the Single-State. This was a strange proceeding in Hamilton who believed so emphatically in national supremacy. The present Amendment has wrought injury to the Union and to the good name of the country. Especially it encouraged Georgia later to defy

the Federal Judiciary in its attempts to protect the rights of the Cherokees.

AMENDMENT XII.

1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list the

Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

This Amendment was adopted in place of the first method of choosing the President, which has been already given (Art. II., Sec. 1, Cl. 3. See preceding, pp. 199, 205). At the fourth election for the Presidency (1800) the struggle arose over Jefferson and Burr, between whom the electoral college was a tie; the contest was transferred to the House of Representatives which balloted thirty-five times without result. On the thirty-sixth ballot two States changed their votes and Jefferson was elected, chiefly through the influence of Hamilton, his greatest antagonist politically.

To prevent such trouble in the future the twelfth Amendment was introduced and adopted before the following Presidential election. It has, however, not given complete satisfaction, though still in force nominally. But time has changed its essential character (see p. 205). There has been a strong tendency to have the President elected directly by the People whose embodied Will he represents, doing away with the intermediate device of electors. In 1824 the choice of President fell to the House of Representatives, which elected John Quincy Adams. In 1876 a

new kind of difficulty occurred: two sets of election returns were received from several States, one for each political party (republican and democratic), and the election was known to turn in favor of one party or the other according to the set of returns adopted. The affair was settled by an Electoral Commission of fifteen, which gave the Presidency to Hayes by a vote of 8 to 7. By a law passed in 1877 Congress sought to prevent any similar trouble in the future.

These twelve are what we have called the old Amendments to the Constitution. They introduce no organic change into the instrument, and should be sharply distinguished from the three Amendments which are to be next considered.

NEW AMENDMENTS TO THE CONSTITUTION.

The following Amendments, Thirteenth, Fourteenth and Fifteenth, may be distinctively called new in contrast with the preceding Twelve, which are indeed old, being actually older than the Constitution itself. But now we pass to the Amendments resulting from the Civil War, and embodying the great change brought about by that event.

They are all more or less directly limitations upon the Single-State, whereas the former Amendments are almost wholly restrictions upon the power of the United-States. The central Government now asserts itself with might, yet through the assent of the Single-State. Manifestly it is a new national spirit, springing chiefly from the States which are children of the Union and which here proclaim the authority of the parent.

These new Amendments pertain more or less directly to slavery which is now cut out of the Constitution root and branch. There is no Amendment prohibiting secession; the theory of the North was that the Constitution originally did not permit secession. But the Constitution did

recognize slavery, so this is the part which must be changed.

Already we have often noted that the characteristic of the United-States is that it is the State-producing State, creative not of colonies nor of provinces, but of equal States, which have in turn to reproduce the Union, their origin. Now this Union had in it from the beginning a deep cleft or dualism, that of the Free State and of the Slave State. So it, as State-producing, will propagate its separative character, and produce the two kinds of States, Free and Slave. This two-fold propagation will continue along the dividing line to the Mississippi and across it, with a good deal of political agitation and threatenings, but no outbreak.

Already long before 1860 the South, ruling the country, began explicitly to declare and to initiate the policy of making this republic the producer of Slave States by opening all its territories to slavery. On the other hand, by way of opposition, there sprang into existence a party in the North whose avowed principle was to exclude slavery from the national territories, and thereby make this republic the producer of Free States. This last party in 1860 elected its President, Abraham Lincoln, which election was followed by the secession of a large number of Slave States, whereupon the Civil War began. The outcome was that slavery was annihilated both in the new and old Slave States.

The Union is still State-producing, but now it produces only one kind of States, Free States. Thus it has become a true Union, both in its spirit and in its highest product. The double character of the Nation, introduced into the Constitution at its birth, has been eliminated from that instrument. The process of such elimination is given in the three Amendments before us.

It is evident that the distinction between Free State and Slave State goes back to the attitude of the given State toward Free-Will. The Free State recognizes Free-Will in every human being; his labor and the product thereof are his own. But the Slave State recognizes Free-Will in a certain class only, to which belongs the labor of the enslaved class. The slave-holder could not will Free-Will universally through the Institution; in part at least he had to will the contrary. The Northern man had no such limit placed upon his willing Free-Will. Hence a decided difference of character developed between the people of the North and the South in this respect.

In these three Amendments we note a gradation or ascent from the first to the third. Briefly this fact may be designated as follows: —

1st. Every Person (or Self) in the United-States shall be free.

2d. Every Person (or Self) in the United-States shall be a citizen.

3d. Every Person (or Self) in the United-

States shall be a voter (this last Amendment is interpreted to exclude women and minors).

Thus the slave is transformed into a Free-Will (as far as any Law can transform him), which he is not only to receive but as voter is to reproduce in and through the Institution. Very rapid work is this. On the other hand the Union as State-producing has produced not only Free States out of Territories, but it has also produced Free States out of Slave States, new and old.

There has always been much question about the manner of adopting these Amendments. No doubt a species of coercion, part military and part political, was employed; no doubt the motives of their originators were strongly tinged with partisanship. But the spirit of the time in political matters usually works itself out through personal and party ambition. Here we are to consider chiefly what was done in its relation to the total movement of the Union.

AMENDMENT XIII.

1. Neither Slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

Here we meet with the word *slavery* for the first time in any constitutional enactment. The ratification of the present Amendment was an-

nounced December 18th, 1865. Already slavery had been abolished in the District of Columbia and in the Territories. Lincoln's Proclamation of Emancipation had declared all slaves free in the States which had rebelled, on January 1st, 1863.

The Amendment essentially annuls the constitutional distinction between the Free State and Slave State. All are now Free States, which means that every Person in the United-States shall be a Free-Will, and not the property of another. The old Constitution permitted an exception to the willing and securing of Free-Will, which exception is now taken away. The social and economic distinction between master and slave is no more. Still further, Naturism resting upon a distinction of race is removed from the Constitution, which here grants and secures to the black man freedom, that is, a Free-Will. The old Constitution did away with the distinctions of class, or aristocracy; it showed almost no exclusiveness in the matter of foreign birth; but it did recognize the difference of race. But this likewise is to be henceforth obliterated from the organic Law. Thus the worth of the human Self is affirmed as universal; no Classism, no Nativism, no Naturism, is permitted (see *ante*, p. 120). Such is the prodigious stretch of the present Amendment inclusive of all races; but the full realization lies still in the future.

AMENDMENT XIV.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United

States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The main fact determined in this Amendment is that of citizenship, which, previously left to the Single-State, is here settled by the United-States. Every Person (or Self) shall be a citizen of the United-States first of all, and then of the Single-State. The spirit lying back of this Amendment is born of the new Single-States which are children of the Union, and not of the old Thirteen, though the latter established the Union. In the old States the man was first a citizen of his State and then of the Union; in the new States, the man was first a citizen of the Union and under its protection in the Territories, and then he became a citizen of the State.

Such a declaration, making the former slave a citizen, involves a number of important changes in the Constitution, which are given in the various Clauses of the present Amendment. In the Southern States the new citizenship requires a fresh basis of representation; new leaders may also be needed, as the old ones led the rebellion. There must also be a clear understanding about the two war-debts, Northern and

Southern, as well as about compensation to former owners for their slaves, now citizens.

In *Section First* it is declared that "all persons born or naturalized in the United States" without regard to color "are citizens of the United-States" primarily and then "of the State wherein they reside." Every person shall be not only free but a citizen with civil rights; the stress is upon selfhood (the Ego) which is here endowed with citizenship, and secured by the United-States. Such is the new worth of the individual now announced, for "no State shall abridge the privileges and immunities of citizens of the United-States," who are all to enjoy "the equal protection of the laws."

This may be regarded as an answer to the Dred Scott decision of Judge Taney which declared that a free negro of African descent was not a citizen within the meaning of the Constitution, and could not sue in the Courts of the United-States. This decision the popular mind boiled down into the pithy statement that "the negro has no rights which the white man is bound to respect," though Judge Taney did not use these words in his decision. So the reversal of the Dred Scott decision which Lincoln called for in his famous debate with Douglas came in the form of the present Amendment.

A new Apportionment and with it a new representation of the former Slave State, is set forth

in *Section Second*, which is to be compared with the corresponding passage in the old Constitution (Art. I., Sec. 2, Cl. 3). "The whole number of persons in each State" are to be counted for the representative population. Still the State by some test can limit the right to vote, so that citizenship and suffrage are not yet equivalent. But if a State restricts suffrage, its representation in Congress will be proportionately diminished. It is still left to the State to determine suffrage, but not citizenship. If citizenship conferred suffrage, women could vote according to this Amendment, and such an inference has been sometimes drawn from it. But the State is to settle the question of woman suffrage. Every person born or naturalized in the United States is a citizen but not necessarily a voter.

The election of representatives and other officers calls up the leaders who have been mostly in rebellion, and who thereby are excluded from holding "any office civil or military under the United-States or any State." Such is the purport of *Section Third*. Those who left the service of the United States and joined the Confederates are considered to have violated their oath "to support this Constitution." But such persons can have their disabilities removed by Congress which has on the whole shown itself lenient in this matter. The Clause has in it a personal

tinge which it was well for the country to get rid of as soon as possible.

A very important consideration comes up in *Section Fourth*. In the Civil War two public debts were contracted, that of the North and that of the South, one for the maintenance of the Union and the other for its overthrow. The one is to be paid by the entire United States, the other is not to be paid at all. Nor is there to be any compensation for the loss or emancipation of the slave, though during the war the offer of payment was made to certain States.

Such is the Fourteenth Amendment conferring universal citizenship, and re-adjusting the Constitution to the new order. The old method of representation in the former Slave States is set aside; the leaders are put under political disabilities, they can get no pay for their service in war; their property in slaves, which was also their means for acquiring property is annihilated; they are sent down to the bottom, politically, socially, and financially, to begin over again.

What is left to them? After all, a good deal, let us see: —

1st. Their land is not taken away; they are still owners of the soil. Thus they still possess the primal basis of every social order. This fact is very important, is the first stage of reconciliation. The South would have been an Ireland, and worse, if its land had been confiscated.

2. The institutional organization of the State remains essentially the same, so that men returning from the war find not only their land, but also their institutional home. There was an attempt on the part of outsiders to seize these local institutions and to administer them in the interest of strangers, but the old leaders gradually returned with disabilities removed and took possession.

3. Every man still has a Will and must now use it in the way of work of some sort. On the toil of others whom he owns he can no longer live, and it is the best thing for him that he cannot, as he will in most cases now acknowledge.

Having such an outfit, the South will rebuild its new home with astonishing rapidity.

AMENDMENT XV.

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

This Amendment takes a step in advance of the previous one, and makes every man not only a citizen but a voter. The difference between the two is great. The citizen is entitled to protection of life and property; the State is to safe-guard his rights. But the voter is to make the law, not simply receive its protection; he is

to re-create the government over him and keep up its process. This implies that he has the governmental process in his Self, and is capable of knowing and performing the duty involved.

But what if the voter have no such consciousness, no constitutional Self behind his vote? The only answer is, he cannot truly perform the voting function, he cannot vitalize or make actual the governmental idea. Can the African mind, just escaped from bondage, grasp the complex American system and administer the same? If he cannot, and yet votes, there is the deepest kind of contradiction introduced into the Constitution through this Amendment. The American voter has logically within him the State-producing State, which he is to keep alive and active in its process. Can such a State be kept going by the former African slave, who in some of the Southern States has the majority of votes? If it cannot, then the grant of suffrage to him has ignored and destroyed the very nature of suffrage.

Such is, then, the new problem which the Fifteenth Amendment has transmitted to the People of the United-States in the future. Nature has asserted itself against the Constitution. Two limits of Nature it has removed: it has made the black man free, it has also given him citizenship. But the third limit it has not removed; it has not made him a voter in spite of its command. The

rule of the majority in his case will not hold, Nature forbids. To be sure where the negro is in the minority, there he votes. But the fact cannot be denied: the training of the black race has not evolved the political consciousness which lies at the basis of the American State and is necessary to work it. This is the limit which Nature has clearly put upon the African in his present racial status. But is this limit of Nature to continue? Can it be removed by education, and by a certain amount of political training? That is the hope of us all. For the free citizen *ought* to vote; but if he cannot perform the act in truth, that is the end of the argument. The destiny of the Self, African or any other, is institutional freedom, which, however, has slowly evolved itself out of the limits of Nature.

So the African has introduced a new contradiction into our organic law. In the old Constitution his enslavement created the grand dissonance; but in this new Constitution his freedom has created the grand dissonance. Strange counterparts we see in this matter; the South undertook to rule the North through the black man as slave, and brought on the Civil War; then the North undertook to rule the South through the black man as a free voter, and has likewise failed. The logic of events would seem to proclaim that both have committed a violation, indeed at bottom the same violation. For both used the Constitution as

a means for their partisan ends, and both deeply perverted it, the one in the name of slavery, and the other in the name of liberty.

When the Fifteenth Amendment declares that "the right of the citizen of the United States shall not be denied on account of race," it sweeps away completely the racial distinction in the State and affirms an universal humanity coupled with political equality. Who does not hope for and believe in such a consummation in the far-off future? But keeping to the present which we have to manage somehow, we find that the given race does not possess the inner ability underlying all suffrage, and cannot perform the duty which is the necessary counterpart of the right to vote. For every right has its corresponding duty, and if the person is unequal to the duty, the right falls to the ground.

Such appears to be the reason why the last enactment of the Constitution has the least life of any portion of the instrument. It seems to be moribund in those States where it was intended to be mainly applied. So the question has arisen, North and South: What is to be done with the Fifteenth Amendment? To-day this is the hardest problem of American politics. Throughout a number of States it is the great begetter and nourisher of constitutional violation in the white voter — certainly a most deplorable result. Some will say, execute it. But just that is the

difficulty. The majority whose right is involved and whose duty it is to see to the execution of the Fifteenth Amendment, cannot perform their function.

So it must be confessed that our Constitution, fountain of so many harmonies, has struck in its last note an awful dissonance which grates harshly upon the entering Twentieth Century. Then other races are coming in besides the African. What about the Philippinos and possibly some nearer home? It would seem that the Nation which has cast off in its Constitution not only Nativism, but also Naturism is going to have its principle tested in the fires of experience.

Part Third.

POLITICAL SCIENCE.

We propose in this Third Part of our work to give a brief outline of the Science of the State, emphasizing the fundamental thought of it and the psychical processes of this thought. The attempt will be to organize the basic concepts flowing from the nature of the State into a connected Whole which will not leave out the genetic movement of the mind creating these concepts. Thus Psychology shows the first source of the State, and gives the method of its science. Will is a phase or activity of the Self (or Ego), and the State as a product of man's Self reaches back to the Will, of which it is a stage or manifestation.

The State as a whole is a form of actualized Will (see p. 18), and hence an Institution. This

Institution, however, must have its own special character as distinct from other Institutions. Already we have designated it to be that form of actualized Will, which returns to Will and secures it *through the Law*. In the latter thought we have the pivotal point upon which the development of the State must turn. The voice of the State is the Law commanding, yet this command must be seen to have as its purpose or content the securing of Free-Will.

We are, first of all, to behold the rise of the State out of the very nature of human Will, which is not truly actual without the State. As long as man has Will, and exercises it, he must build the State as his institutional abode. The State with its Law is not a transitory phenomenon in human progress; it does not vanish with man's greater perfection, but is to become more perfect with him. Nor is it a restraint upon freedom, it is rather the final security thereof.

If a man builds the State, in a still deeper sense the State builds him. Citizen-creating, and therewith man-creating is the State, giving character and worth to all its members, and likewise true liberty.

The State is not a Person or an Ego, and is not to be called such except by way of illustration or metaphor. The State is a Will, objective, universal, whose utterance is Law, and this alone;

the State has properly but one expression, and that is Law, whose supreme end is freedom.

Still we may conceive, for the purpose of helping our thought by an image, of the State as a colossal Person with a mighty Will which he employs for just one purpose, namely, to secure the weak Will of the individual. Or the State is our big brother who is to aid his small brother in getting and remaining free, against all assaults upon the latter's liberty. Now this huge Giant is nothing but Will; he is indeed all Will, we might name him the All-Will (universal), whose function is to return to the struggling little Will (individual) and make that valid in the world. Such an All-Will can speak only in commands, his word can only be Law; yet this command must fundamentally be to affirm and to secure its own essence, namely, the free-acting Will.

To be sure, Law can be purely external, since its form is that of a command. Hence we hear of unjust, tyrannical laws, imposed by the arbitrary Will of a ruler, whose intent is to destroy rather than to secure freedom. Such a negative power does indeed lie in the State and its Law, whereby results not only destruction, but self-destruction of the State.

The individual becomes civilized through the State (*civitas*), being made a citizen of it, who no longer obeys his own rude Will, but the Law, which is the All-Will voicing his freedom. Thus

man can live with others who likewise obey the Law, wherein lies their bond of unity. Not simply one can be free, but all can, in the Free-State, for they unite in the Law by willing the freedom of all. The single Will by itself cannot be actually free, though it may be internally or subjectively free. When its freedom is willed by all through the State, and vindicated by every right arm in the land if necessary, then is the freedom of the individual actualized, truly objective and existent.

When the Stoic said he was free though in chains, he meant that he was subjectively free, not institutionally free. He did not live, and pretended he did not care to live, in a State which secured his Free-Will; an inner moral freedom he might have under such circumstances, but not an objective institutional freedom. But the very end of this soul-liberty is that it become a world-liberty, actualized in institutions, and thus be not for the one alone but for all. Man cannot be institutionally free wholly to himself, or within himself. He must help set his brother free, and secure their common freedom by a new Will actualized in an Institution.

Though the State is not strictly a Person, still it has to be filled with and functioned by the Person. The State as actualized Will is not to be deemed an Ego in the human sense; still it must be set to work through the Ego, it has to

be administered by a Self. The pure objective Will of the institution is made active through authority which is a Self. The State has to be *Egoized*, in order to perform its continual process of government.

This Person in authority, however, is not to follow his own individual Will or caprice; if he does so, he becomes the tyrant. He is ultimately to have but one content to his Will—he is to will Free-Will impartially, through the Law. He is not to secure his own personal advantage, or that of any other Person, in opposition to the good of all. When the official begins to secure the individual against the universal Will, corruption of the State has set in. The State is to be functioned by a Person who makes himself impersonal. Here lies the grand problem of all political administration: How can the official pour his selfhood into the State without his selfishness? for both belong to his Self. How can the ruler separate his capricious or merely individual Will from the truly universal Will which it is his first duty to make valid? In this matter we shall note a great movement of the ages; the ruler whose word was once the Law and put others under the Law, is now (for example in the Constitution of the United States) first of all put under the Law himself, ere he can be ruler.

The State is properly a secular Institution, the

third and supreme one, having its underlying movement with the two antecedent secular Institutions—Family and Society. We have just said that the State is not an Ego or Self, yet it is the objective counterpart of the Ego with the stress put on the Will. In a sense we may regard the State as self-conscious, or always moving into self-consciousness; it must know its own Self and utter the same in the Law and still more deeply in the Constitution. It was a great step in advance when the Law passed from being spoken to being written; a yet greater step when the Constitution of the State, which lies back of and creates the Law, passed from its unconscious, implicit stage in man to being conscious and written. In the written Constitution the State is for the first time truly aware of itself, of its essence and can look at itself, and know itself through the great means of modern communication, namely the printed page. Thus the latest State (the American) will be recognized to be the truest institutional counterpart of the human Ego, the self-conscious one, inasmuch as it is not simply self-willing (wherein the State is or has been mostly unconscious hitherto) but also self-knowing. In the past the people were supposed to know the Law, but now they are supposed to know the Constitution also, must know it in order to fulfill the duties of citizenship. For every citizen has become fundamentally the law-

maker, hence he must know the Constitution which is the creative principle of the Law formulated for the self-conscious Ego. But at times the citizen has to descend still deeper into this institutional Self and become not merely the Law-maker, but also the Constitution-maker; he is called, at given periods, to make over the very presupposition of all legality, to re-create the creative principle of the State itself. This recreation, if progressive, will always bring the State a step nearer to its ideal originaive prototype, the self-conscious Ego.

Such is the growing worth of the human Ego, which is more and more assimilating the State to its innermost movement. Self-consciousness beholds itself reflected in the State as in a mirror. Yet this magic mirror in turn goes back to the Ego and secures its free action in the world. The State is thus an outer Self, which not only wills freedom, but knows the same as its end, and utters the same in its commandments.

The individual cannot help making the State, it grows as naturally as his body. His simplest act of Will producing an object has in it implicitly the State, which is also an object produced by Will. Yet this second object is itself Will, Will actualized. If I make a chair, this is a product of my Will; but conceive this chair transformed into a Will as object, whose function is to secure my activity of Will, and we have before

us the State. Will, being the objectifier, finally must objectify itself as Will. My Will makes the chair as object, but in the end it must make the maker, namely, itself, into an object, not indeed for the senses, but still very real. Now this self-maker, this Will making and securing itself is the Institution, which, voicing its power through the Law, is the State.

It is sometimes thought that the State with its Law will vanish with the progress of mankind. When all do the good, Law, being prohibitory of the bad, will not be necessary. The fact seems to be, however, that the State develops with civilization. Indeed it is a contradiction in terms to say that man, as he becomes more *civilized*, will not require a *civitas* (State) nor need to be a *civis* (citizen). Civilization in word and thought springs from the State. Moreover when man wills the good, he must will the Institution which is just the means of securing the highest good, namely freedom. The supreme virtue is institutional virtue, which can have no content or meaning without Institutions.

In like manner it has been supposed that man must give up his freedom or a part of it when he enters the State. Really, he then first gets his freedom, or begins the getting of it. Man can be truly free only when his freedom is buttressed by the freedom of all enforced through the State.

Such is the State in its fundamental positive principle, which is, in general, the principle common to all States. The Positive State is the State as such. We seek to conceive the essence of the State, that which makes it specially, and hence that which enters into all States, however diversified they may be in other respects. Their unitary germ is the thought of actualized Will, which is to secure Free-Will through the Law.

But the State is not a mere dead result; it is a living, psychical process which is eternally going on reproducing itself daily like the human body. This process cannot stop till death. The State has to be always making itself over in ceaseless movement. Every State must have the State-making process within itself as the very source of existence. Finally we shall see the State (the American) throwing outside of itself this inner self-production and becoming objectively the State-maker, whose supreme function is to call forth new States. Undoubtedly it has taken a long evolution to reach the State-making State, but this idea was implicit in the political Institution from the beginning.

Now the self-producing process of the State is the distinctive element of what we have just named the Positive State, since it calls forth or posits the State. Ultimately it is the Ego as creating the State, and hence the process is in-

herently psychical and will show the three stages of the Psychosis.

But working in this positive element of the State is likewise a negative element which asserts itself as an inherent, necessary stage in the total process of the State. The Law we shall find to be in essence prohibitory, that is negative, and the Law voices the soul of the State. To be sure the Law prohibits something which is, in general, hostile to Free-Will; or, in technical speech, the Law negatives a negative, and therein restores or preserves the positive, but the State may become purely negative, destroying, yea self-destroying. Very important is it to bring out to the light and to grasp fully the negative element of the State in its total sweep from Law to Anarchy; especially important is it in these days when there seems getting to be as much theoretical lawlessness as practical.

The downward movement of Anarchy reduces the State to its atoms, which are the individual Wills composing it. But at this point, and usually before it the opposite movement sets in, indeed has never ceased, though overpowered: that of reconstruction of the State after or rather alongside of destruction. Here we may recall once more the sentence of Aristotle: Man is a State-making animal (see preceding p. 44); he instinctively builds his State, as the bird builds its nest. With this thought we come

upon the third chief division of Political Science, which we may call in the dialect of our period, the Evolution of the State, its ascending movement to its present form. Political evolution is the counteraction and overcoming of political revolution, the grand response to State-dissolving anarchy.

From the foregoing remarks it will be observed that there are in the present treatise three fundamental divisions of Political Science: —

I. The Positive State.

II. The Negative State.

III. The Evolution of the State.

It must never be forgotten, however, that these divisions are in a process with one another, and form together the inner psychical movement of the total State. This movement it is the object of Political Science to set forth, primarily in its totality, and then in all its special processes, which must be shown as derived from and connected with the one fundamental process of the State. The method for making this unity transparent in all the multiplicity of its parts is the Psychosis, which is what first creates the State, unfolds it, and finally comprehends it in its own genetic order.

There has been a great difference among writers on Political Science in regard to its fundamental divisions. Usually they take their own divisions for granted without further inquiry. Our purpose is to bring the organic order of the

science into strong relief, and to emphasize the method which separates it into its parts great and small, and then unifies these parts into the ordered totality of the science. (For a fuller statement and application of these divisions the author would refer to his *Social Institutions*, pp. 19-23, etc.)

I. THE POSITIVE STATE.

One of the difficulties connected with the discussion of Political Science is the right use of the terms employed. Like every Science, time has elaborated for it a set of expressions or categories peculiarly its own, which, however, have a tendency to run into one another and mingle together. Political Science has to make distinct and to define these terms largely inherited from the past. It has need of them all. It must seek, for instance, to distinguish and to utilize the words *Government*, *Administration*, *State*, which easily coalesce, or are used one for the other.

Now these definitions should not be made from the outside in a random manner, but from the inside, and should be seen proceeding out of the basic thought of the Science in its psychical process. In other words, all the definitions should be evolved genetically from the Psychosis, and take their place in due arrangement, in a procession, as it were, co-ordinating and subordinating themselves as they rise created from the Self,

Such a procedure will give, we hope, not a disconnected series of definitions and descriptions in an external and capricious order, but an internally jointed and generated totality of Political Science, at least in suggestion and outline.

The Positive State will show the universal process of the State as it stands before us, existent, in its immediate appearance.

As indicated, the Positive State must be grasped, first of all, as a process which is three-fold, and which will more explicitly reveal itself in the Three Powers of the State. But these properly belong to the Constitution, which in turn is a stage or phase of the Positive State. But the Constitution of the State shows itself in many Forms, in a vast multiplicity of States, which fact is the second division of the Positive State. Finally each of these forms must be administered by the Person (or Ego) in order to be vitally or rather spiritually active. These three stages or divisions we shall separately designate as follows: —

The first of these stages can be named (I) *The Constitution of the State*, which is the inner genetic movement of the State as actualized Will, which utters, applies and enforces its mandate, the Law. But this process of the Constitution will be found to have many ways or methods of realizing itself, which fact gives to us (II) *The Forms of the State*, such as monarchy, aristoc-

racy, and democracy. But these Forms taken by themselves are helpless, indeed hollow, and must be filled with the Will of the individual Ego, which fact brings us to our third stage entitled (III) *The Administration of the State* or Government proper. Through the latter the State as an external object becomes subject, and is individualized so to speak; the abstract Constitution gets concrete and is endowed with life, yea with an Ego by an Ego.

Thus we behold what is here designated as the psychical process of the Positive State — the inherent, necessary movement of the State in its creation, which must take place every day. That the State has also within itself the process of destruction, that it shows a descent forever going on in correspondence with its ascent, has already been noted and will be developed in its place under the head of the Negative State. At present, however, we are to consider the State in its positive aspect, unfolding it through the various stages of the process which has just been outlined.

I. THE CONSTITUTION OF THE STATE. This we may primarily grasp as the unitary process which makes the State, which is its inner essence and organic energy; hence it is common to all States. As the principle of the State is actualized Will securing freedom through the Law, so the Constitution must be

the process by which the State makes valid its principle. The Constitution reveals the means whereby man not only lives in a social and political order, but is to live a freeman.

Every State, however rudimentary it may be, has a Constitution, which will also be very rudimentary. It is the generative idea of what has been called the organism of the State; this idea or conception unfolding into the organic members of the State is what actively constitutes the same, is the Constitution.

Now this Constitution, being the active constitutive principle of the State, will have its process. Being the creative thought of the object, it will have the movement of the thinking Self, which creates it and for which it is created. We shall note in it an implicit undeveloped stage; then comes its unfolding into its separate powers or divisions; finally these separate powers must again unite into one ruling movement, and each power must participate in all.

Such is the psychical process underlying and generating the Constitution, constituting or putting together all its parts into one movement. This we may call, in the present connection, the Constitutional Psychosis, which shows the inner creative process in the Constitution of the State.

This process will be, accordingly, threefold, as follows: —

1. The implicit Constitution, which is, in gen-

eral, the immediate unity of the Constitution with the Self administering the State.

2. The Three Powers of the Constitution, which show the separate elements of the Constitution.

3. The Government, which unifies the Three Powers into an outer process controlling the individual.

The Oriental State generally has the Constitution still implicit. The ruler bears in himself all the functions of State, they are his subjective process of mind. Thus there is no separation of the State and its law from the caprice of the sovereign. His is purely a personal government, and yet a government with its Constitution whose Psychosis is one with that of the monarch's Self.

In Greece the State with its constitutional process began to separate itself from the immediate process of the ruler's Ego. The State is no longer just I myself. The State as city has its own distinct individual life. But the single Will of the citizen remained one with the State, and was largely determined by it. In the modern world, however, the citizen largely determines the State and makes the Constitution. The ruler still rules the people, but the latter determine the ruler who rules them.

Of course there are European States which still keep up the Implicit Constitution, to a greater or less extent. Then some States revert to it, tem-

porarily. When Louis XIV. said "*L'état c'est moi*", he declared the identity of his Self with the Self of the State, which may be called a case of political reversion to a former condition.

1. *The Implicit Constitution.* Long before man knows the State, it is existent and working in the world, and he is a member of it. In like manner, long before man knows his Self, he has a Self and it is active. Such is his implicit or unconscious Ego which has its counterpart in the State and hence in the Constitution.

Still this Implicit Constitution is Will actualized and has some kind of law. The Ego as Will exercises command over other Wills who obey, yet in their obedience find their own freedom, such as it is. The ruler is both Wills, the individual and the universal, between which is as yet no distinction. He makes the law, judges and executes it, all in one.

We speak of the Constitution of the mind, which is its very essence or genetic process. The Ego has its Constitution, too; so has the State as actualized Will, being sprung of the Ego and partaking of its essence or genetic process. For the Ego, making the Constitution, gives to the same itself, has only itself to give. The thought we may unfold a little.

(1) The Self (or Ego) must be grasped as the creative source or starting-point of all Constitu-

tions in which it makes itself objective. The political Institution is a development of man, and that which makes man is Self, Ego.

(2) Now this Self has its own Constitution, or innermost nature. Moreover it is a process, which process constitutes it, makes it what it truly is. Your Ego possesses this power of separating its own Constitution from itself, of examining and describing the same, as we are doing now. Such is the original self-division of the Ego, its primordial act of Will, after which it begins to know its own Constitution as the very process of itself, which process is fully set forth in the science of Psychology, being known there as the Psychosis. Hence the Constitution of the Self as the genetic germ of all Constitutions in all things must be grasped not merely as a result but as a process ever going on; the Constitution is to be seized not only as the constituted, but likewise as the constituting, generated yet also generating. Now that which this process of the Self generates will be some form or manifestation of itself, whose creative inner movement must be this process of the Self.

(3) Here we reach the connecting thought, which may be expressed thus: the Constitution of the Self is the Self of the Constitution. This statement may seem at first glance a mere play of words, but the earnest reader will take the time to cast a second glance or even a third one

into the matter. That inner process of the Ego (which we call the Psychosis) will be found everywhere the ordering principle, because it is the creative principle everywhere. The State is made by the Self, in image of the Self, for the Self, and shows in all its parts its origin.

But at the start in the, Implicit Constitution, both sides are in immediate unity in the Ego. That is, the Constitution of the Self is implicitly one with the Self of the Constitution. The next step, however, is to see the separation of the two sides, since the Ego is inherently self-separating as well self-unifying. Thus that which was implicit in the Constitution becomes explicit; the bud, so to speak, unfolds into the flower.

2. *The Three Powers.* That which we called the Self of the Constitution begins to separate from its inner or unborn condition in the human Self, and to externalize itself into reality, taking its own special form as distinct from its source, the Ego, yet having necessarily the threefold movement of the latter. The State now starts to be itself distinctively. In it the first outer manifestation of the Constitution as such hovers about the so-called Three Powers (legislative, executive and judicial) which also have had their long period of development. Their latest form we have seen in the Constitution of the United States. But their early form lies in the Self of the ruler, who exercises all three Powers with

little or no separation. They exist, but they exist in one person, possibly in one act.

The main fact in the present connection is to grasp the Three Powers as the fundamental norm of the explicit Constitution, and as the first real psychical process of the State. Man is a State-producing animal, as we have often heard; the implicit movement of the Ego becomes political or State-producing in the development of the Three Powers.

(1) These have also their undeveloped stage in which they exist and are active all together in one Self, not yet separated. The first ruler exercises all Three Powers. The Family is the original State, or the primordial institutional cell whence issues the full-formed State. The father of the Family is the first monarch, and utters the law over his own domestic realm; he legislates, executes, and judges in his one capacity. The Patriarch is the ruler of an extended Family, and in him the Constitution with its threefold function is still implicit. The same may be true of the absolute monarch of a great empire.

(2) The first to separate would seem to be the Law-giver who has played an important part in Orient and Occident. The legislative principle insists upon its own independent operation and so gives its command, in the form of Law, to all the people. It may be also said that the people demand the Law to be placed over them.

selves as something distinct from its application or execution. For the Law is universal, and through it the State distinctively begins to be itself. The State as already defined is that form of actualized Will which is to secure man through the Law. Hence the State hardly commences till it has the Law in some kind of express formulation. Previously it is rather one with the Family, not yet fully differentiated, till the Law gives to it explicitly its means of performing its distinctive function. The Oriental States had their Laws (Hebrew, Persian, Hindoo, etc.). Thus the Law-making power separates from the administrative Power, and therewith the political institution rises into clearer outline.

(3) The judicial Power is the last to differentiate itself from the Implicit Constitution and to become an explicit, independent, co-ordinate Power of government. In fact it is no such Power in the European State of to-day, only in the American Constitution is it a co-equal branch of the total governmental process along with the two other branches, the legislative and the executive. This fact may be emphasized a little. The Constitution of the United-States first placed the Judiciary on a par with the other two Powers. In England and in the rest of Europe it is still subordinate. The American Constitution thus puts Justice into its supreme place in the State, and thereby gives a kind of judicial character to the

People enthroning Astræa so high. Moreover the inner constitutional movement, which we call its Psychosis, is now complete for the first time in history. This institutional supremacy of Law is the great trainer of the People to legal-mindedness, which has become peculiarly ingrained in the national spirit. Ancient Rome and modern England show this same characteristic, but necessarily not in so high a degree, since they never gave Justice quite so high a place in their political order.

Looking back now at the Implicit Constitution with which we began, we find that it has become external and explicit. Its inner process has unfolded into an outer process of three separate Powers.

We have already, in the preceding exposition of the Constitution of the United States, given such a full account of the Three Powers that it seems unnecessary to repeat the details there set forth. Moreover they have in that connection the advantage of being drawn directly from the reality before us. But at present we may emphasize the psychical fact underlying these Three Powers and constituting the originaive source of their existence as well as the form they take. They are the outer Ego with its threefold process, being not only separated from the inner Ego but also showing its three stages separated and external to one another. Thus we

may see that the Self (or Ego) being controlled by the State is fundamentally controlled by itself, to be sure in the form of externality. In the primal thought of the State man makes out of himself a world for governing himself. It is not an accident of time that, in the highest form of self-government man has yet attained, we find the most complete and distinct development of the Three Powers. The American citizen, looking into the depths of the Constitution of his country, can behold his very Selfhood there actualized and governing him, so that he is truly Self-governed.

With this thought we have come to a new stage in the process of the Constitution, namely, that of Government. This outer universal Self is to bear rule over the many particular Selves, whereby they become a political society with its authority.

3. *Government.* The Three Powers more or less explicit and separate, are now unified into one process, the governmental, and in this form are brought back to the Self, from which they originally unfolded. The Government is the authoritative Self which rules, directs, controls all individual Selves within a certain limit. The Ego is now subjected to its own Constitution as outer, not as inner; or we may say, the Self of the Constitution returns to the Constitution of the Self and makes the same its own, so that the two

become one. The authority inherent in all Government is just this constitutive process of the Ego as objective and universal; it is what they all are, yet as real, existent in the world, and so it commands them, just as the universal subsumes the particular. The man who denies Government denies his Self as a reality, making himself a mere inner shadow, or subjective phantasm which exists for him alone. Government is the process of the Ego as actual, and is for all Egos, not simply for one. It has been often declared that man, as he grows better and becomes more civilized, will dispense with Government, with Law, with the State, there being no need of any outer authority. But the fact is that as man develops, so the State develops. We cannot too often repeat that the Government is the very Self of man made real, made a true entity, which otherwise would be unreal, untrue, having no objective validity in the world. Without Government mankind would be a Hades of wandering ghosts, embodied, it is true, but otherwise having no actual objective existence.

The Constitution has attained in Government its active external Process as the outer ruling Self over Selves. But this process too has various stages of development.

(1) The Three Powers must not fall asunder but remain a united Process. Sometimes they have been conceived as separate and independent

of one another; such a conception destroys the unity of Government. Nor do they exist to counteract one another, which they must do if they are merely regarded as a system of checks and balances. They are not in equilibrium, else Government would come to a stop. The Three Powers are not a device for neutralizing one another's activity, so that the individual can be free. All such views fall back upon the separative stage of the constitutional Psychosis, deeming that its constituents must be held apart. But thereby we lose the real process of Government, which as the outer Self must be psychical. Thus the Constitution as governing maintains its unity, and is the Law.

(2) On the other hand the Constitution as Law is what creates the Law-making Power. So it comes that out of the Constitution grow two kinds of Laws, the organic and the statutory. Thus government makes and unmakes Laws through the Constitution, which as the one stable organic Law passes over into a multiplicity of Laws.

(3) Still all this multiplicity of Laws must be conformable to the Constitution; they must have its unity manifested in them, else they will be declared unconstitutional. To decide whether the statutory Law is conformable or not to the organic Law is the special function of the Supreme Court which is likewise established by the

Constitution. Thus the Judiciary as the third Power of Government is always bringing the multiplicity of Laws, which have a tendency to multiply themselves indefinitely, back to the one Law which is the Constitution. Hence the governmental process is a unity, which, however, is not fixed and dead, but is active and alive, in a self-separating yet also self-returning movement.

Such is the special use to which we put the term *Government* in the present exposition, though it has a good many other applications. Sometimes it is employed to designate the entire Constitution, not simply the Constitution as the active process of the outer Self determining the individual Self. Again Government is frequently one in meaning with the Administration or even with the entire State. These are all general usages of the word which cannot be called incorrect. But in Government as here used we wish to bring before the reader's mind the conception of an outer Self with its process, which is the universal essence and the Law of the individual Self.

We may, therefore, regard Government in the present sense as the completed movement of the Constitution. The latter we have seen unfolding through the three stages, first of which is its implicit existence, second is the three separate Powers and finally these unite in the process of explicit Government. The Constitution has now

fulfilled itself as the inner genetic process of the State, which is thereby perpetually asserting and recreating itself, having a truly vital movement in its organism.

In this connection it is well to note the educative value of the Constitution with its explicit threefold Powers for the citizen who has to work it and also to think it. He beholds his outer Self as his ruler and the ruler of all other citizens; he is brought face to face with the process of his Government, which is his own inner process made real; whereby he has to believe in the objective existence of selfhood as the fundamental fact of his daily life. The American citizen, if he believes intelligently in the Constitution of his country, has to believe in the Psychosis as objectively valid, in fact as the ruler of this world. Ultimately he must come to see the process of the Self not only in his State but also in the Universe. Thus the political Institution is the greatest of all training-schools, making its member truly a thinker, we may say a philosopher. Plato's *Republic* has as its apex a band of philosophers who are to rule the State; but the Constitution of the United States has the tendency to make every citizen, even the humblest at the bottom, a master of the Psychosis, through which the creative act of all things is seen. That makes or will make philosophy (or,

better, psychology) the common possession of all citizens.

We have now concluded the Constitution of the State, or the primal genetic unfolding of the political institution, its creative conception. This process in psychical speech we have named the Constitutional Psychosis, which is really the common generative principle of all States. It is not only that which creates them, but also that which governs them, or the Government proper of the State. To govern the country is to keep the Constitutional Psychosis going, performing its function; the political Self of the State must be as active as the individual Self, of which it is an outer counterpart.

Such is, then, the principle of unity in all States. But this unity is now to enter the stage of separation, in which it will pass over into many kinds of States or forms of Government. Thus we come to the sphere of division and multiplicity, showing the diverse manifestations of the Constitutional Psychosis as it embodies itself in a manifold reality. So we reach the second stage in the movement of the Positive State. Or, if we wish to employ technical terms, we now are to pass from the Constitutional Psychosis of the State to the Morphological Psychosis of the State, the latter seeking to bring into a psychical movement all the kinds of political Forms that have arisen.

II. THE FORMS OF THE STATE. — If we take a brief survey of the many kinds of Government that have existed and still exist throughout the world, we begin to appreciate the vast diversity of the present subject. The first problem which comes up is that of putting into some sort of order the mighty maze of States which man has brought forth in the course of his political evolution.

The old Greek was the first thinker, as far as we now know, who seriously began to classify the Forms of Government. Necessarily his look was confined to the horizon of his own people, with their City-State. We see from ancient Herodotus that the Greeks already knew and speculated about the three divisions of the political institution which took the name of Monarchy, Aristocracy, and Democracy, or the rule of the One, of the Few, and of the Many. This is the first and simplest of all ways of dividing the State. It answers the earliest question: Who and how many shall rule this State? Government implies direction, authority over men; what man or men are to exercise such authority? We have to regard this old Greek division as the stepping-stone, as the first attempt, which is to be transcended; still it is a seed-thought and has remained and unfolded down into the present.

How is this great diversity of States brought about? The preceding constitutional process is

the Constitution as it is in itself, the element common to all States. Now this process must make itself real, must be born into an outer world and not remain simply a conception or idea. In such case nature has an important share in determining it, which fact may be first noted by observing that quite every considerable stretch of land on the globe has its own peculiar sort of State. Climate, character of the soil and surface, mountain and plain, river-valley and sea-coast, all work themselves subtly into the Constitutional Psychosis, determining it in manifold ways and giving to it a unique form. Thus a physical element plays into the formation of States introducing differences among them, and reflecting to a certain extent all the diversities of the globe in man's political institution.

But to these outer physical influences are to be added inner influences of character, which belong to every tribe, nation, race, and are the result of untold ages of heredity reaching back to primeval man and even before him. Every group of human beings may be said to have its own distinctive character, upon which the external conditions of Nature act, with re-action on the part of man. One people, the Greek, will produce a marvelous multiplicity of States, differing from those of antecedent peoples, and differing from one another. Two Greek tribes, Ionic and Doric, will bring forth diverse kinds of Constitu-

tions and show quite opposite political tendencies. These tribal distinctions inside the same nation in essentially the same climatic conditions indicate a long previous evolution of tribal character.

Such are two determinants leading to diversity in the Forms of States — an outer or physical one, and an inner or moral one. Deeper and more universal than either of these is the third, which we may call the institutional determinant. The first Institution of man is the Family, in which he is born; the early State will be in more or less immediate unity with the Family, and so may be called the Parental State. The second Institution (secular) of man is Society, and so we shall see a second great group of States whose essential relation is social not domestic. The third Institution (secular) of man is the State, which in the long process of History will turn back upon itself and produce the State of States as distinct from the Society of States.

The fundamental classification of the diversity of States is, then, to spring from their institutional relations, internally and externally. Moreover we shall find that this classification falls into three vast territorial areas of civilization, Asia, Europe, and America. These distinctions we may set down in a brief survey before developing them more fully.

I. The Parental State in which the parent is

the ruler given by nature; this form of State when civilized belongs specially to the Orient, and is expanded into the Empire-State of Asia.

II. The Social State, in which the Single-State appears as an independent member of a Society of States, which Society is continually seeking to become a political unity. Such is, in general, the European State, always showing a struggle between some form of the Single-State and some form of the Empire-State.

III. The State-producing State, or the Federal Union, in which the European conflict between the Single-State and the Empire-State (or central authority) is reconciled and transformed into a process of unity whereby the Single-State produces the Empire-State and the latter (the Federal Union) produces the Single State. This is distinctively the Occidental State, as different from the Oriental and the European.

The sweep of the State through Orient, Europe and Occident is a vast process of evolution which is in its essence psychical, showing a triple movement which we may call a world-psychosis. This movement has just begun to manifest its third stage, which seems to complete the circle of the earth.

1. *The Parental State.* This is the first form of the State among all peoples everywhere on the globe. It is in more or less immediate unity with the Family; it has been named the

Family-State by some writers. The domestic ruler and the political are one person at first, and remain of one nature to the last. The authority of such a ruler is paternal, imperial; the first great empires of the world were Family States extending their power over similar States. Such a ruler is given by nature, he is born to his dignity. Authority comes originally from the Family, which is by itself a little empire, yet is capable of expanding itself to a vast empire like China, which is a Parental State containing from one-third to one-fourth of the human race in one Family.

The Parental State, however, shows many diversities, in which we may note an ascent. It would seem that each parent has at different times been at the head or at the center of the Family and its authority.

(1) The Matriarchate or the rule of the mother may be regarded as an established fact for certain peoples; but it is questioned whether all peoples have passed through such a condition. Kinship is reckoned through the mother, not through the father, who is uncertain, inasmuch as the woman is polyandrous. Thus the blood-tie holding together the tribe or community is purely maternal. Likewise property is hers, and descends through her alone to her children. Thus conceived, the Matriarchate is a very early form of the Family-State, with the mother as

ruler. It is probably the only gynocracy that ever existed, all other forms of government being androcracies. (See our *Social Institutions*, p. 137-141.)

(2) The Patriarchate or the rule of the father is far better known to our social system and seems to us more natural. In this form of the early Family we find the domestic, political and religious institutions centering in one person who is father, king, and priest. His authority is imperial; his sons and even the families of his sons are under his absolute sway, which extends to the power of life and death over them. The wife and children of the Roman father were legally his slaves; he was the Oriental despot in the bounds of the Family.

But Families increase and fathers pass away; the tie of blood widens and becomes less strong; the Patriarchate with its authority, but not necessarily with kinship, changes into a new form of government.

(3) The Phylarchate, which our evolution of the State has now reached, is still the Paternal State, but with the paternal element, in the sense of kinship, left out or transcended. The authority, however, is still paternal, being derived from the Patriarchate with its absolute power over the member of the Family-State.

The Phylarchate will embrace numerous distinct forms of State, of which the main ones are

Tribe, Nation, City; the rulers or Phylarchs will bear the various names of chieftain, king, emperor. The tribe evolves into a Nation or a City according to circumstances. But the interesting fact is that with the rise of the City-State civilization proper begins. This original City-State with its civilization is first found in the Orient and starts in the great river-valleys, as the Nile and Euphrates.

Here we note the conflict which springs up in the Phylarchate, particularly in that of the Orient. The Tribe extending itself to a Nation composed of many Tribes has its seat chiefly in a mountainous region, whence it descends upon the civilized but effeminate City-State of the fertile river-valley, conquers the same and founds the Oriental Empire, which is still in essence a Phylarchate, or the Paternal State with its absolute authority over the individual.

The great History of Herodotus records the rise of the Persian Empire, which started from the Persian Nation composed of uncivilized Tribes originally and situated in the mountains of Central Asia, and which absorbed all the City-States of the Western part of the Orient. Then the Persian Empire sought to absorb in like manner the European City-States of Greece, and was utterly defeated in the attempt. Wherewith a wholly new order of States begins, the European, in decided contrast with the Oriental State.

It should be added that in the Parental State the ruler is also the supreme priest, as the political and religious institutions are quite inseparable, or are different sides of the same institutional Whole. The Orient is the home of Theocracy (the rule of God) which, however, is not something distinct from the Parental State, but one with it. To the seen element of authority is added the unseen, both in the same person; this world and the other are immediately united, and the visible manifestation of the invisible God is the Monarch.

But in Europe the great separation of the World's History begins, taking on many forms, one of which is the separation of the religious from the secular institution, and also of the State as such from its oneness with the Family.

2. THE SOCIAL STATE. — This is the most distinctive as well as comprehensive designation which we can give to the European State, taking into account its manifold forms along with their historic evolutions. Europe has been and still is a Society of States, from the early Society of Greek City-States down to the present Society of European Nation-States. It has often been called a Family of States, but in strictness the Family principle is what it strives to throw off and has thrown off. Undoubtedly an imperial element runs through European History,

but it has always been stoutly assailed and put down, though rising up afresh under new forms.

The European Society of States shows two tendencies: the one is to become a Society of independent, autonomous Single-States, and the other is to unify this Society under one of these Single-States, which thus becomes an Empire-State. Such we may call the European political dualism, starting in ancient Greece and lasting down to the present, opening in the one case with the Society of City-States and ending in the other with a Society of Nation-States, but with the Empire-State rising and falling and rising again all along the historic line in perennial conflict. This vast interplay of European Forms of State we shall briefly summarize in a few details.

(1) The Society of Greek City-States is the first political Form which meets us in the History of Europe, showing some outlines of itself already in Homer. But that which gave it fame for all time was its defeat of Persia, which had made itself the Empire-State of the Orient. Europe thus opens with a deed asserting the Society of independent Single-States versus the all-absorbing Empire-State as Oriental. Thus the triumph of political autonomy as separated into a multiplicity of States is the overture to European History.

But the struggle will be transferred from without to within Europe; the Empire-State will become European, and maintain a long conflict with the

Society of separate Single-States which will continue to fight imperial authority and unification. Here, then, is the kernel of this entire movement: one of these European Single-States will seek to conquer and to rule the other Single-States, which will resist singly or sometimes leagued together. Such is the political dualism of Europe, whose tension produces its varieties of States as well as its History.

First, then, we witness the movement of the Society of ancient City-States, the bearers of Greco-Roman civilization. The Greek City-State springs from the Tribe with its migratory instinct; the entire Greek race develops into a multiplicity of City-States at the dawn of its History, when we can often see a tribal group passing into a city. But the imperial principle also sets in, seeking to unify the discordant warring mass of individual City-States. The Empire-State will be at first one of these City-States, which will exercise a kind of imperial authority called Hegemony over the whole Society. Athens, Sparta and Thebes obtained the Hegemony in succession, and lost it in succession. Next, not an Hellenic City-State but an Hellenic Tribal State, Macedon, became the Empire-State of all Hellas, under Philip and Alexander, and conquered the Oriental Empire of Persia. But Macedonian supremacy was not lasting; it was succeeded by the great Empire-

State, Rome, which was truly the imperial City-State of all antiquity, and consolidating into one Empire all the separate City-States of Italy, Greece and the Orient, and not a few Nations also within these limits.

Such is the general movement of Greco-Roman antiquity in the present field, from a vast multiplicity of City-States scattered over the civilized world to their unification in one Empire City-State. But everywhere around the border of the Roman Empire with its civilization lies a vast new multiplicity of peoples uncivilized, whom we may call the Tribal Nations. With these necessarily rises a new conflict, in which they are held in check for several centuries by the Roman Empire; but at last they burst over its confines and shatter it to pieces. Herewith begins the second great movement of the European State.

It may be here added that in the ancient civilized City-State men begin to reflect upon their State, and to distinguish its Forms. Especially in Greece the reflective man, the philosopher, will make those distinctions in the kinds of States, called Monarchy, Aristocracy, and Democracy, and give a start to Political Science, which, in the hands of Plato and Aristotle, becomes a permanent spiritual acquisition of the race. Their look, however, is chiefly directed to the internal condition of the Greek City-State, very little

have they to say about the Society of Greek City-States.

(2) A new Society of Single-States now appears upon the scene of History, namely that of the Tribal Nation-State, originating far back in the social impulse of the Tribe to found States. This impulse drives against the limits set up by the Roman Empire, which at last is overwhelmed and broken up by these Tribes, each of which takes a slice of the conquered territory and forms a new State, which will be also new in Form. Slowly the Tribal Nation-State will be transformed into the Feudal Nation-State through the civilized Empire City-State of Rome. Thus a Feudal Society of Nation-States, separate, independent, comes into being, recalling the old Greek Society of City-States, with which the first European epoch began.

But here also an imperial tendency will make itself valid. A new kind of empire will arise, not that of the ancient City-State, but that of the medieval Nation-State, which subordinates in one way or other the various Feudal Nation-States, of which it is one. The great appearance in this sphere is the Empire of Charlemagne in the West, which in various forms maintained itself down to the last century. The struggle between the two kinds of States, the Single-State and the Empire-State of the Middle Ages, ended substantially in the triumph of the former,

producing what has been called the modern Nation-State.

(3) We now have reached the third Society of Single-States in European History. The three may be designated according to their epochs as ancient, medieval, and modern. The Nation-State of to-day has worked itself free of the Empire once over it; but on the other hand it has become itself imperial in turn, subordinating other Single-States when it can, inside and outside of Europe. The present Single-State of Europe is thus an Empire-State also; three or four of the great European States call their sovereign by the name of Emperor.

Europe is, therefore, a Society of Empire Nation-States. Each of these European States is independent, autonomous, yet seeks to get the better of its neighbor State, so that this modern Society of Empire Nation-States has still the essential political principle of the ancient Society of Greek City-States, which were also independent, autonomous, yet one was always trying to subject the other till the Empire City-State of Rome arose and put them all under her sway.

Such is in outline the movement of the European Social State, beginning with the Society of Greek City-States and ending in the Society of European Nation-States. The first passed over into the Empire, but the latter have each absorbed the Empire into its internal character. We see

that the Society of City-States has been transformed into the Society of Nation-States, through the Roman Empire in its conflict with the rival Nations of the North.

The reader will notice in the preceding exposition the three chief divisions of the European State—the City-State, the Empire-State, and the Nation-State. These three again show a variety of shapes, for instance, the Nation-State is tribal, feudal, and imperial. All these Forms are in a process with one another, as we have just seen, each Form assailing and subordinating the other in the succession of European History.

But is this conflict to remain eternal? Man begins to see that the Society of States must have a controlling authority, or an Empire-State, but not as hostile or even distinct from itself; on the contrary, this Empire State must be the product of the Single-States, and these must in turn produce the forthcoming new Single-State. Plainly such a political order solves the perennial European conflict between the Forms of its States.

3. *The State-producing State.* This is the Occidental State, the third grand division of the State, preceded by the Oriental and European Forms. The imperial State is no longer outside the other States and Nations, subjecting and even destroying them and then being destroyed by them in turn, as in Asia and Europe. On the contrary, the imperial State is now creative of States, not

destructive of them; they have become its own children, and are enemies no longer. Moreover they reproduce the imperial State, and if it be assailed defend it as a vital part of themselves.

The rise of the Single-State is not left in the Occidental State to tribal instinct or caprice, which blindly vents itself anywhere and in any direction. The central Empire-State looks after it, produces it, becomes its parent. In this sense we may see that the Occidental State is a return to the Parental State of the Orient, being now the conscious founder and organizer of States, not simply a Family-State having an individual parent, real or fictitious, as ruler. That is, not a Parental State merely, with parent given by Nature and hence of an uncertain character, but a parental State of States, itself the product of reason and producing States rationally. Thus the Single-State is in an inner process of life with the Empire-State, is not external to it and fighting it as the foe of its liberty. Nor does the Single-State here make itself an Empire Single-State which subjects to its imperial power other Single-States — which is, in general, the European political situation.

This process of the Occidental State we give briefly as follows: —

(1) The Society of Single-States, in the form of European Colonies at first, establishes an Empire-State with its central authority over all

equally. This is no longer the imperial Single-State of Europe, subjecting and ruling over other Single-States already existent through its superior power.

(2) This new Empire-State of the Occident (often called the Federal State) is the source of new Single-States, which it supervises and directs. Thus the origin of States is no longer left to the State-producing instinct of the Tribe, as was the case with the rise of the European States.

The migratory act is left to the individual who still has that old Aryan impulse to move West and found new States. He goes or stays at home as he pleases, not being under the compulsion of his Tribe or Nation; if he chooses to go, he settles where he pleases, finding everywhere a place prepared. The free-acting individual Self is the migrating unit in the Occidental State, not the Tribe.

(3) The new Single-State thus produced by the Empire-State, returns and reproduces it through representatives of various kinds, and if need be through military and financial support. Thus each Single-State through the Empire-State becomes itself State-producing, being an integral and determining part of the central Power which calls forth the new Single-States.

Thus we see that the Occidental State is in its completeness two States, the Empire-State and the Single-State, united into one process

which we may call the State of States, and also the State-producing State. It is the universal State, which creates the individual States, yet the latter go back and recreate their origin, the universal State.

We may likewise see that these two kinds of States were in external opposition and conflict throughout European History. But they have been internally mediated and freed of their conflict in the Occidental State, in which they work harmoniously together in the production of States. In Europe and Asia every kind of State arose through Nature or the natural human instinct; but now the State is a product of the Institution rather than of Nature. As before said, the old Aryan impulse to State-production is still present in the individual, but is directed and organized by the new central State purposely and consciously toward its institutional end. Hence Naturism dominates the State in the old world, with its royalty, nobility, and privilege; but Naturism is decidedly subordinated in the new world, which substantially sets aside every right springing from birth. The American Nation itself was never born (*natus*) in the sense of the Nations of Europe and Asia; it was made by man's self-conscious intelligence, which must accordingly be the ruling principle. The individuals of the American Nation may be quite of any nationality, but the citizen has or

ought to have the consciousness of the American State which he is to reproduce by his vote.

Another movement we may notice in this Society of States. It is the rise of Society proper, or the social Order which reposes upon labor. This element was disregarded in the ancient world; in the Greek City-State, the laborer, the artisan was almost left out of the State as set forth by Plato and Aristotle. Still he was there and at work underneath the Society of Greek City-States. But in the modern world he will rise to the surface, and the European Society of Nation-States will show a tendency to become a Society of Persons, each of whom is a member of the Social Whole which is not confined to the Single-State but is a kind of universal State. To this each individual worker belongs, contributing to it his labor and receiving from it his compensation. The European Society of States remains, but it has developed a new social unity, not that of empire but that of commerce and industry.

The dominating political question at present is, Which kind of State will best foster and unfold this new social unity? The European Nation-State or the American Federal-State? This question ultimately goes back to another: Which kind of State most adequately secures the free activity of its citizens, who are all members of this Social Whole? The answer to such

questions is involved in the movement set forth in the preceding exposition.

The Society of Nation-States, separate, opposed, mutually jealous, stands in the way of economic Society through war, excessive taxation, military levies of individuals. It cannot secure the Free-Will of the worker as a member of the Social Whole to the same degree as can the State of States, which gives a double security to Free-Will, namely that of the Single-State and that of the central government. There is in it no conflict between States, no conflict between citizens of different States.

The field for the exercise of free activity of the individual is extended enormously, having back of him a Society of States not interfering with Free-Will but securing it. The marvelous economic development of the United-States goes back to their political institution and its training of its citizens.

Hitherto States have unfolded out of human instinct, have grown wild, as it were, from some migratory class or tribe. These States in development have developed man and with man so that we may say that the State is also man-building, the great civilizer. The moderns are inclined to think that man makes the State while the ancients (Greeks and Romans) leaned to the thought that the State made the man. Of course both sides must be united.

But now there has come forth a State which is not alone a man-builder, but also a State-builder. The State still moulds its citizens and forms their character, but into this process between State and citizen has entered a more profound genetic principle. The State as creative of States is now to work upon the citizen and the man, and to reproduce him in accord with its new political idea. For it is not only a man-builder, but also a State-builder, and as such imparts to the citizen its character. For the State-producing State must develop the State-producing citizen, who is thereby to remain no longer the instinctive political animal but the self-conscious rational State-builder who is perpetually reproducing through citizenship his State which in turn is perpetually reproducing new States, and thus imparting what is best of itself to the rest of the world. So much for the educational significance of the State-producing State which might be much further unfolded.

The Forms of the State thus overarch the world and the world's History from the Orient, through Europe to the Occident. In a general way they seem to pattern themselves in the three grand groups after the three secular institutions of man — Family, Society, and State. The essential principle of the Oriental group is the Family of States; that of the European group is

the Society of States; that of the Occidental group is the State of States.

But leaving these large and somewhat indefinite generalizations for the present, we have next to consider the fact that, whatever be the Form of the State, it is hollow, a mere shell or at least a lifeless organism till an Ego (or many of them) enters the Form and makes it living, and perchance lively. That is, the Form of the State must be administered through Persons—wherewith we enter upon a new part of our theme.

III. THE ADMINISTRATION OF THE STATE. — This is the third stage of what we have called the Positive State, and in it there is a return to the Constitution, which now has to be *administered*, that is, filled and set to work by the individual. The actual living Self (or Ego) must enter into the outer Form of the Constitution (which is in any of the preceding Forms of the State), and vitalize the same with its own self-activity. Technically we may say that the Objective Psychosis of the State is helpless and empty till it be filled with the subjective Psychosis and made to act. This is the principle of Administration, in which the individual as public servant appears (*minister*, servant of the Institution).

Each form of State, therefore, with its Constitution is to be *Egoized*, before it can perform its function. The Powers of the State and all its

parts are but dead members till the self-active Ego as administrative enters the lifeless body politic, and *personifies* it, that is, makes it act like a person. Administration is the soul of the political organism, while the organic creative principle of it as abstract is the Constitution. The State is not of itself a Person, but through the Person it becomes active and self-active; it is the duty of the administrative Person to make his institution live and do its part in the world. The Constitution by itself is but an outer Psychosis which the inner Psychosis must take possession of and administer.

The public servant (or the administrative Psychosis) is to bring the Constitution (which is also a Psychosis) home to every Ego (or Psychosis) in the land. Such is the inner psychical process of the present matter. Of course we must not forget the end of all this to be the securing of Free-Will to every person, who in turn must serve his country by paying taxes, and in many other ways. The State as such is actualized Will, which wills freedom as its ultimate end, which end, however, can only be accomplished through an individual Will administering the State. Thus Administration mediates the Constitution with the People, makes it live in them anew, and keeps it energizing in the soul of each citizen, who is, more or less directly, to determine the Administration.

The main stages in the administrative process are three. First come the Officials, who perform the immediate work of administering the State to the citizens. But the Constitution may be construed in different ways, which fact calls forth different Parties, each with its own policy or plan of administering the State. These Parties reach down ultimately to the People, who finally even in absolute government determine the policy, though by very different methods, ascending to the Form of the State. So all Administration will have its official, its partisan, and its national elements, which constitute its complete process.

Administration is different from Government, since the latter has to be administered. Moreover its Administration may be better or worse than its Form; America especially, with a good Form of Government, has too often a bad Administration of it; in Europe on the contrary there are instances in which the Administration of the State is better than the State itself.

In Administration there is also a process; really it is the process of the People governing themselves. The movement is, the People are governed by Officials, who by means of Political Parties are chosen and governed by the People. Such is the round of self-government, government of the People by the People. That which governs them (the

Administration) must be referred back to them every few years, and pass through their Selves individually for approval or for change. This is the psychical fact of a free country: the institution controlling the Self and requiring obedience must be ultimately controlled by the Self.

Accordingly we have before us what may be named in the present connection the administrative Psychosis, which, though itself the third stage of the Positive State, has in its own process three stages as follows: —

I. Officialdom.

II. Political Parties.

III. The People.

Each of these stages we shall consider briefly, always trying to trace its position genetically and to behold it not in isolation, but as created by and functioning in the total movement of the State.

1. OFFICIALDOM. — It is the function of the official to administer the State directly to and for the People. Of course there is every grade in the official class; some have a permanent tenure like the Supreme Judges of the United States; others who have special skill in their department, are seldom disturbed. But the head officials determine the character or policy of the Administration; their tenure of office is changeable, reflecting some sort of change in the nation, or possibly in the monarch.

As already said, an Ego must administer the State, must legislate, must judge; these powers though abstractly an integral element of the Constitution, do not work of themselves. Moreover a good State must be governed by good men to be a good State, and the best State is only best when governed by the best. It is particularly an American delusion, or has been, that the Constitution will run of itself, or with anybody simply turning the crank. But thus the best Form of State, being badly administered, becomes the worst. *Corruptio optimi pessima.*

Officialdom is often called the *personnel* of the Administration, or its distinctively personal element or character, by which it acts and works as a Person.

(1) Primarily the official is to be conscious that he as Will is to will the State (which itself actualized Will) with its Law through his own personal Will. Thus his first official act is to take an oath to support the Constitution.

(2) Hence the Official has within him two opposite forms of Will, the universal Will of the State and his own individual Will, with its special content, as impulse, passion, self-interest. This is the grand inner dualism of the official soul, which runs through the whole official world from highest to humblest, and which has made a marvelous display of itself in Literature (Shakespeare's *King Lear*) and in

History (from ancient Cambyses to modern Napoleon). The movement of the ages in this matter has been to put the individual Will of the Official, even of the Supreme Ruler, under Law.

(3) The Official is not to be a machine or perchance a mere cog on the wheel, even through the Law. He has his sphere of self-active work, and so must be a Psychosis, in order to fill truly and to make active the State's Psychosis, which as Constitution is abstract and lifeless. The principle of life is not life.

Thus the Official as individual truly administers the State as universal, the former not taking the latter as his personal perquisite, and the latter not absorbing the former into a purely mechanical routine. Good administration requires each Official, high or low, to be an independent Psychosis in his sphere. However prescribed this may be, in it he can be perfect and so be ideally the highest.

In some States the official class become the rulers in substance, and possess the power of keeping themselves in office against king or people. This is a beaurocracy, and indicates an inherent tendency of all officialdom, which can become very tyrannical, being truly a many-headed despot worse than Demos.

In the United States every official knows the Constitution as the ultimate ground of his conduct, being sworn to follow that. But the Con-

stitution is necessarily very general, and has to be interpreted. Hence there rise diverse ways of putting the Constitution into practice. At this point we see that difference enters the Administration of the State, difference in policy. It is the policy of the Administration which determines its official character. But what determines this policy?

2. *Political Parties.* The Administration of the State reaches back to a Political Party in some form for its support as well as for its origin. Party means a part and necessarily implies another part; thus the separation enters and with it the struggle of Parties for control of the State. The Administration is, accordingly, partisan in its very nature; it is chosen or taken to carry out a given policy which is the principle of some Party. The fact is notorious that every State has Parties, and the more developed the State, the more developed the organization of Parties.

In ancient Greece, Parties turned on the Form of State—Monarchy, Aristocracy, or Democracy. The result was the overthrow of a Party meant a corresponding change in the Constitution. The same characteristic is found in most States of modern Europe; the ultimate division of Parties reaches down to the support of or the hostility to the existent Form of Government. In every European Republic there would seem to

be some monarchists or aristocrats, who wish to alter the total Constitution; in every European Monarchy there are republicans who strive to change not the Administration but the State itself. America and also England are substantially free of such revolutionary Parties. In each of these countries both Parties heartily accept the Constitution, but they disagree about interpreting it and administering it.

Each Party in the United States supports the Constitution, but each puts its own meaning into this instrument. Such is the ultimate ground of Party division. Hence each Party may be said to have its own separate Constitution, yet derived from the one source. This is variously called its policy, or, when written out, its platform. Still further, each Party has its own organization or Form of Party, analogous to the Form of State. Finally each Party has its special administrators, or officials of the Party, again corresponding to the officials of the State, into whom they hope to transform themselves through their work for the Party. These are the Politicians.

Thus we note that the Political Party is a kind of embryonic State seeking to become the real State. It is extra-constitutional, yet its aim is to enter into the Constitution and to be its working power. This fact we shall look at more fully.

(1) The policy of the Party is essentially its

Constitution which it evolves out of the general Constitution. Some men will lean to the rights of States and favor the centrifugal tendency; others will hold to a strong central government, and so will support the centripetal tendency. Both these tendencies have their germ in the Constitution which establishes the dual government, the Single-State, and the United States, and will call forth two Parties. Still further, men will be inclined to a strict or loose construction of the Constitution, and so form two Parties. But the deepest source of Parties in the United States has been the deepest principle of the Constitution, its State-producing principle. Now this principle divides in the question: Shall the Union produce Free-States or Slave-States? Here is the origin of the most important political Parties that have arisen in this country.

(2) Such is the division into two Parties, and sometimes more, each with its own principle which is a kind of new Constitution developed out of the old. In the United States the organization of Parties is as intricate as that of Government and is really the preparation for Government. There is always a Party in power and a party out of Power; each is seeking to direct the evolution of the Nation along its constitutional path, which sways forward in a sort of wavy line from one side to the other between their struggle. Through Political Parties the

Constitution is realized and is made to unfold in historic progress toward its goal. Their place in the State, particularly in the American State, is of the highest importance.

There is no doubt, on the other hand, that partisanship can be grossly abused, and the Party made the source of deep corruption. There is a negative element in the Party which may lead it to destroy the end of the State itself, for sometimes it seeks to usurp the place of the State. Just as Officialdom may strive to be the whole State, so also the Political Party.

We may note, too, that one Party has a tendency to persist, the other to change. In the United States, the Democratic Party on the whole has been the persistent Party though it has certainly undergone some decided transformations. The Party opposite to it has been the mutable Party, having changed its name and organization and policy at least three times since the beginning of the American Government, and being known in history as the Federal, Whig, and Republican Parties. Each has shown its virtue, the one having conservatism, and the other progress. Each, too, has shown its limitations, which have had to be corrected by the other. The differences of Party reach back to the psychical nature of men, some of whom will hold back and others push forward.

(3) The party organization must be made to

work through individuals; in other words it must be *Egoized*, as we said of the Form of the State. This need calls into existence a peculiar class of Party officials, known as Politicians.

A very large class it is. Federal officials alone are said to number more than 130,000, the greater portion of whom are also Party officials. State, City, County, Township, in fine every political division, furnishes its quota of Politicians, many of whom are in office, and many more are out of office but trying to get in. All of these keep the machinery of both Parties in running order, and therefore have their undoubted place in the total political system.

Much evil is said of the Politician, but he is a necessary evolution of free government in the American form. Nobody can deny that he has often exercised a corrupting influence, still he is not to be dispensed with. At the same time something about him ought to be changed. The difficulty seems to lie in the fact that both Party and Politician as such are not recognized by the Law, are outside of its pale to a certain degree, are not held accountable for their political work, unless it violate rights otherwise secured. For instance, the primary elections within the Party are supposed to be purely a voluntary matter with which the law has nothing to do. But in the manipulation of primaries the "boss" and the "ring" have gained their power and retain it.

The consequence is that the Legislature in some States is putting the primaries under the control of Law, in order to secure the free expression of the Party which the ringsters try to thwart.

As the Party and the Politician have become an integral part of the process of the State, the latter must put them under its control through Law, and make them responsible. At present both are in the main irresponsible. The State is to secure Free-Will, but that is what the irresponsible Politician through his devices seeks to nullify. So he must be made legal, but he is not to be abolished, nay, he must be recognized within his sphere and even secured by Law.

Such are the elements of Political Parties, two or more in the State, each with its Constitution (the Party platform), with its Organization (the Party Machine) and its Politicians (or Party Officials). We have already called it the State in embryo, not yet born into the real State, which, however, is its end. The movement here outlined is a necessary part of the State, specially of its Administration.

We have now found out that the policy which the Administration of the State carries on through its Officials is determined by a Political Party, one or the other. But what is the source of the Political Party? The answer to the question carries us down to the base of the pyramid of State, namely, the People, who are the unit un-

derlying all Parties, and who have their own inner process which we are next to consider, especially as self-determining or self-governing through the Administration of the State.

3. *The People.* That which divides into Parts and Parties is the Whole, the People, who in the most advanced modern States determine the Administration. The People for the most part elect the Officials through the medium of Political Parties. Thus we see the entire movement of the Administration of the State; it is in essence the process of the People governing themselves. First, the Official determines the citizen, of course through the Law; but in the end the citizen turns back and determines the Official, choosing him and giving him the policy which he is to follow. Here too we may note again the function of the Political Party: it is to mediate the People with their State, bringing them to determine the policy of its Administration.

The People have their inner political movement, which is threefold, and shows in outline the folk-soul in its psychical process. The People in the first place is an immediate psychical being with impulse, passion, suspicion, instincts good and bad. The People in the second place show a reflective element in Public Opinion which divides into two Parties, and these become a majority and minority, by the test of the ballot. The People restore their inner unity by the rule

of the majority to which the minority agrees. Such is in general the mediation of the People with itself, governing itself not immediately but mediately through the election of its representative Officials. A few words upon each of these topics.

(1) The People as immediate is a mass of individuals, each with his own opinion, caprice, interest, degree of intelligence, etc. In this condition the People's voice is not the voice of God (*vox Dei*) but often that of passion, delusion, suspicion, prejudice, even envy. Often, but by no means always. It has likewise the power of coming back to itself, to its best Self, which it ultimately wills with all its might. Homer's picture of the Demos in the Second Book of the Iliad is true for all time; listening to one discouraging speech, it rushes to its ships and is ready to depart for home and leave the great deed of taking Troy unaccomplished; but another speech recalls it to itself, by holding up before it the supreme national purpose, whereat all turn back to their long wearisome enterprise and are again ready for an assault upon the Trojan walls. This is not merely fickleness in the People, who, though capable of sudden emotional gusts, yet has in itself the eternal substantial element of the ages.

Perhaps the greatest acquisition of time is that the People has found itself out, knows and

acknowledges its weak side. We have already noted the fact so patent in the Constitution that the American people distrusts itself as immediate, it will have nothing to do with itself as a mass, it will not allow itself directly to make or judge or execute the law. To be sure sometimes a community will break over this restraint, usually under great provocation, and take the law into its own hands, but such an act is elsewhere condemned as hostile to the national spirit. The American People insists upon being mediated not once but several times, and so has established at least three governments, one on top of the other, from the local, through the State up to the National. But while it distrusts itself as immediate, it has all the more confidence in itself when mediated by its institutions, and is bent on determining their Administration. In this respect the American democracy is quite the opposite of the old Greek democracy, being representative through and through, doubly and even trebly so.

Still this immediate spontaneous phase of the People has its place in the order of the State. The new Idea begins to ferment in the masses, often in a chaotic fashion; but this is the germ, the creative source of all the mighty movements of the World's History. The Great Man hardly creates the new Idea for the People; rather he voices it, represents it, and thus becomes the

leader. The many he makes one Person, he thus personifies the People. The Great Man is he who separates the true and eternal element of the People from its false passionate, transitory element, to which the demagogue, on the contrary, caters.

(2) The chaotic multiplicity of individual opinions (the first or immediate stage of the People), begins to crystallize, to become conviction, to work itself into clearness through its own agitation, when it gathers itself into what is called Public Opinion, which is always flowing back to the State and its Administration and influencing the same. Now the fact comes to light that Public Opinion usually shows not the unity of the People, but their inherent duality; they make two groups, those for and those against, the supporters and the antagonists of any given policy.

So we have to consider the People as a huge Self which has made up its mind in the form of Public Opinion; this, however, is naturally two-sided more or less, and is thus in a struggle with itself. The question then comes up: How shall this inner struggle be settled? The many opinions of the People center themselves into two main opinions, which is the so-called Public Opinion. This is the popular source of the two Political Parties already discussed, which we now

see rising out of the People, who by nature bifurcate over a policy or constitutional question.

The manner of settling this inner separation and self-opposition of the People is prescribed by the organic Law of the land. The more numerous Party is to administer the government not for itself alone, but for all. Here we come to the idea of majority rule, which is determined through an election participated in by the whole People. Thus they choose their rulers, and determine the Administration for good or for evil. The main fact here is that the People are responsible for the way in which they are governed. They make themselves responsible by their choice at the ballot-box. A great moral training lies just in this feeling of responsibility, which has a sobering effect upon both individual and People. They think twice and twice as long when they have themselves to blame for the bad work of Administration.

(3) The People as the Electorate bring forth unity out of the dualism and uncertainty of Public Opinion. An election is the People's act of Will to put an end to division and hand the Administration of the State over to a certain Party with its policy. In this act of the popular Will the administrative process of the State has completed its cycle, having gone back to its source in the People, who choose the Administration with its Officials through Political Parties.

But the majority who rule have their counterpart and opposite in the minority who are ruled. Here again occurs a difference or dualism in the People about which a good deal has been said at one time and another. The tyranny of the majority has been protested against especially by individualism. It may be a reality if the majority as the larger sum of individual Wills exercises its power directly over the smaller sum of individual Wills called the minority. But it does not directly exercise its power, but it works through the State whose Law secures freedom to all, not to the majority alone. The majority does not make the minority or the defeated party bear all the public burdens. But the majority does determine the Administration of the State, its personnel and policy.

The question has been asked, Who originated the rule of the majority? The old Greeks had it, the American Indians have it in a small way. It is primarily a peaceful method of settling which side is the stronger, a matter which would otherwise have to be settled by force. The savages in council employ it. Such is, however, but its germ; its chief institutional development has taken place among Anglo-Saxon peoples, who use it from the primaries along the whole line up to the election of the American President.

The citizen receives much political training

through being in the minority and also in the majority. The minority have to find out that there is a Will greater than theirs belonging to no individual, which they have to obey. If they had to submit to an individual Will directly, that would be despotism, even if benevolent. But the minority through the act of voting have agreed to the rule of the majority, and they must keep their agreement. Their submission to the majority thus goes back to themselves. Here, then, is the point of unity both for the minority and majority: each is ready to submit to the rule of the greater number.

But the majority have also their discipline, that of victory, which is even more trying than that of defeat. They are to administer the State given over to their control for all — not for their Party alone but quite as much for the minority, for their political enemies. So the majority have to will the universal Will, not the partisan Will — a more difficult thing for the victor than the vanquished, but just the test of their governing ability.

Thus the majority in victory and the minority in defeat have to do the one deed ultimately: both have to will the universal Will which is the State, and thereby show themselves patriots. In this way the dualism of majority and minority is made whole again; the people, divided into two Parties pass through the exciting and sometimes fiery

ordeal of victory and defeat, and come back to themselves with a profounder consciousness of their unity and nationality. The struggle of Parties is thus the process within the People which keeps alive and deepens the national spirit.

On the other hand the negative element in both sides is ever present and makes itself felt in every individual, even when it does not dominate. The majority may use its power for itself alone, and the minority may refuse to submit to a fair election. The Southern minority in 1860, by declining to yield to the popular choice for President, logically destroyed the rule of the majority, which lies so deep in the Anglo-Saxon institutions. After participating in an election they refused to keep the implied agreement to submit to the result.

The People, however, with their own three-fold process as a whole constitute but a stage (the third) of a still more comprehensive process, which we have called Administration of Government, and which is made up of Officials, Political Parties and the People. To be sure, we may consider this administrative process as also that of the People, since all these elements belong to the People, who through them are self-governing. But the People must likewise be regarded as different from their Officials, and also from Political Parties which are often said

to carry out the Will of the People or to betray them — which Will must be then something different from theirs.

Furthermore, we should note, in this review of processes, that Administration is also but a stage in a still higher process, that of the Positive State, which calls up its counterpart, the Negative State, to which we have now come. As sure as man has a negative element in his Will, his political Institution, which is his Will actualized, must have something of the same Element. More particularly since the human Ego is bad or good, negative or positive, Administration will have the same character, bad or good, negative or positive, since it is the State *Egoized*, as above set forth, and so may exhibit all the negative power of man.

II. THE NEGATIVE STATE.

Long ago the Romans, the great Law-making people of History, recognized in Law an element which made it turn to the opposite of itself. This thought they put into a pithy legal proverb: *Summum jus, summa injuria*. The Law is transformable into destroying the very object which it was intended to conserve; it has a negative as well as a positive character, both of which must be taken into account.

President Lincoln in a famous letter once said: "Measures otherwise constitutional might be-

come lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation.” He in substance declares that he had to violate the Constitution in order to save it — violate it in part in order to save it as a whole (see preceding p. 234). The Constitution of the State may in the stress of a great crisis become inadequate, really negative to itself and to the State. The question then is, Can it master its own negative and save itself? In the hands of Mr. Lincoln it was made to do so, and this was certainly one of his greatest acts.

This example may start the reader to thinking about what we have here called the Negative State, or the negative element in the State, through which it separates itself within itself and turns upon and undoes that which is opposed to it. The State must put down that which is hostile to Free-Will, even when this hostile power is the State itself in one form or other. To take Mr. Lincoln’s case, slavery was entrenched in the Constitution; but when slavery became hostile to the Constitution and the State, it had to be in a sense unconstitutionally eliminated in order to save the Constitution and the State.

Psychically we may here observe that on account of this inner self-separation of the Negative State, it belongs to the second stage of the total process of the State, and hence is to be taken as the second grand division of Political Science.

We have hitherto considered the State on its positive side, as it immediately presents itself to thought. But it has also its negative element, which may be primarily heard in the prohibition uttered by the Law: *Thou shalt not*. In this formula we hear the inherent negation which, expressed or implied, lies in all legal command. The individual Will in some form is thereby put under restraint; its natural or capricious freedom is limited, is negated.

But what is the individual Will prohibited from doing? For not every act of the individual is forbidden. Let us, by way of example, fill out the above prohibition with a familiar content: *Thou shalt not kill*. Why? Because killing is itself a negative act, indeed the supreme negative act on the part of the individual. As the voluntary act of the doer, it shows him the destroyer of all Will, of all possibility of Will. The individual in murder logically slays himself; if his deed be made universal, as it must, it includes himself. Now the law is universal, applies to all; it likewise regards man as rational, that is capable of thinking universally. Hence the law in the present case might be expanded as follows: *Thou shalt not kill thyself through killing another*. Looking back through these three italicised statements we may gather up the meaning of that little word *not* as an essential constituent of the

Law, which through it is made negative or prohibitory.

But the deed is also negative (as in the case of murder), and the function of the Law is to negate the negative deed, or rather the negative Will which lies back of such a deed. So it is true that the Law is negative, but this does not complete the thought of it, which is the negation of the negative.

Thus the Law makes the world positive and indeed possible through overcoming the negative agencies thereof. The Law is a hindrance, yet not this alone strictly, but the hindrance of the hindrance. The Law is or may be violence, but properly it is violence for the violent, wrath for the wrathful, vengeance for the vengeful. The Law does not pretend to be forgiveness or mercy; it is man's greatest pedagogue by teaching him the nature of his deed through the consequences upon his own person. Or, to employ our previous nomenclature, the Law is negative, but also the negation of a negative, the latter in the form of human Will.

Thus the Law is double and in fact a process within itself. Now just in this fact lies its difficulty. It is negative and may stay so, never completing its process by negating the negative. The Law may be destructive instead of preservative, unjust instead of doing away with injustice, enslaving instead of knocking off the chains from

the slave; in fine the Law may be purely negative, instead of negating the negative; it may become even the crime instead of the punishment of the crime. Such a twofold and opposite character lurks in the very nature of the Law—which character ought to have a name, and so we shall call it, in the absence of a better term, the negativity of the Law.

This must now be carried back to its source. The State will have the same negative element we have seen in the Law, for the Law is the command of the State as Will actualized. The State is not a Person, not an Ego, but it is a Will, existent, objective, whose voice is the Law, uttered by a special Power of the State, the legislative. So it is really the State which is negative on the one hand, and the negation of the negative on the other. The end of the State is to secure Free-Will, but it can reverse itself and destroy Free-Will; its function is to remove the hindrance, but it can become just the hindrance, and the worst hindrance to man's development into freedom. So we have to consider the negativity of the State as an element of political science.

We have already spoken of Free-Will in the present sphere. A slight acquaintance with it shows that it too has fundamentally the before-mentioned double negative principle in its process; it is negative and can through its own self-activity assail and destroy Free-Will. Then again it is

the negation of this negative act of itself, by its own inner nature. Thus we reach down to the underlying psychical fact of this negative sphere of the State, which is the negativity of the Ego as Free-Will.

It has long been perceived that freedom has this double self-contradictory character. Freedom is a two-edged sword, the most virulent destroyer yet also the grand preserver of the race. It is the supreme end of all Institutions and particularly of the State, yet it can be and often is the most determined enemy of the State, which, in order to preserve it, has to subject it and often to suppress it. That is, the State has to secure free action by undoing or punishing free action when the latter has become negative, destructive of free action. When I as Free-Will employ the same to assail or destroy you as Free-Will, for instance by stealing from you or murdering you, I manifest what is above called the negativity of Free-Will. Now man, of his own necessity and for his own salvation, unfolds or creates an objective Will, the State, which has to meet through its own negative power just this negative element in freedom, and to return the deed to the doer through the Law. Such is the fundamental conception of Justice which has long been recognized as the soul of the State.

The negativity of the State, then, is its inner turning-point, the pivot on which it wheels about

and destroys its destroyer, negates its negative. Herein we see its deeply dualistic or separative nature: it is negative yet must undo the negative, and thereby become the concretely positive. It has to negate the individual Will as particular and capricious in order to secure it as a whole. Right is real, existent in the world (as distinct from subjective right) through the State; right is positive through the negative process of the State which overcomes the violation of Free-Will. We cannot say that the State is a wrong doing wrong to wrong; but we can say that the State is a negative negating a negative, and thereby establishing in the world its positive principle, which is Right.

Such is the subtle dialectical play of the negative in the State, certainly the most elusive and intangible element in its structure. This element is often declared to have no reality, to be a mere juggle with phantoms of the mind which the scientific student must shun as he would the fiend. At present, however, we pass on to observe and to order, if possible, the various phases which the negative State moves through in its development, and which will be found to be real enough.

I. The State as negative may have to negate the negative Will of the individual in order to establish justice. This phase of the State is manifested in *Litigation*.

II. The State as negative may have to negate the negative Will of another State or political organization. This phase of the State is manifested in *War*.

III. The State as negative may become negative to itself, to its end, which is to secure Free-Will. This is *the Perverted State* which shows itself in all forms of anarchy.

Such is the movement of the negative State deepening in its process to the point of self-dissolution. It begins with the conflict of individual against individual, which the State settles through its law; then the conflict becomes that of State against State, which is settled through war; finally the conflict becomes internal, that of the State against itself, in which it begins to dissolve back into the individuals or atoms of which it was originally composed. Thus we have returned to the first stage, to the conflict of individual against individual, to the so-called State of Nature, but without any institutional State to settle its conflicts. The details of this movement are given more fully in what follows.

I. LITIGATION. So we call the collision of the individual Will (or Wills) which is brought before the judicial power of the State for adjudication. It is a kind of legal battle in the presence of judges who have to settle the trouble according to law. The war of individuals in one way or other is continually rising, and when it assails or

even jeopardis Free-Will, it must be put down by the State, which stands outside and above the conflicting individuals and metes out right and wrong with their respective consequences. The test of the State to every individual is: Did you obey my command, which is the Law, to will Free-Will? The case is examined and the decision rendered.

Here we behold the immediate unquestioned unity of the State with its authority over the legal war of individuals. Of these conflicts we note the following stages: —

1. *Conflict between positive Wills.* This is seen in the ordinary law-suit. Two persons get into a controversy over a piece of property, let us suppose; each has a ground of right or may have; each acknowledges the law and appeals to it and accepts its decision. Both sides, therefore, will the right, and so both are positive in their Wills. Often it is hard to decide which party has the better ground of right; still the decision must be rendered that there be an end of the controversy, for this of itself is not conducive to the willing of Free-Will.

It is, however, manifest that even here the State has to act negatively to one of the contestants. That which he deems his right is declared by the Court of Justice to be not his right. But as he has not willed any such negation of right, he is not liable to punishment by the

State, which does not here negate his Will, for that is positive, but simply reverses his judgment in his own case. Man is not punishable for a mistake.

Such is the simplest, most immediate manifestation of the negative power of the State. But the matter wears a different aspect when one of these conflicting Wills is negative, that is, seeks to violate right.

2. *Conflict between the positive and negative Wills.* Previously we had a conflict between two rights; now we are to witness the conflict between a right and a wrong. For wrong enters when the individual as Free-Will purposely assails or destroys the Free-Will of another.

Here we behold a scission or separation of man within himself, since he as Free-Will turns against Free-Will, assailing it or destroying it. Before us now rises the World of Wrong, created by the Free-Will of man, which has just the power of becoming negative, even negative to itself. Such is the inherent doubleness or duplicity of freedom; it is free to destroy freedom. Thus it can in its destructive energy destroy the State and all Institutions, whose end is to secure it, namely freedom.

At present, however, we must confine ourselves to the germ of this destroying agency which lies in the individual Free-Will seeking to undo an-

other individual Free-Will, and which thereby becomes criminal. Of this conflict of the negative with the positive Will there are various grades. The criminal may assail simply the external Will in the form of property, which act is Theft, small and great, or the criminal may assail the Will of another through Fraud, which works upon the mind, and subtly undoes the person's Will with his own consent, wherein lies a certain respect for the victim's right of agreement. But finally the criminal may assail the Free-Will both internally and externally, as the highwayman who attacks both property and person, or the brigand who seizes and holds the person with alternative of ransom or death. In Fraud the criminal pays an outer regard to the Single-Will, though he assails its inner essence which is expressed in the Law; but the negative act of Crime is completed when it disregards both the Single-Will (individual) and the All-Will (State with its Law).

Such is the negative Will of the person, which undoes the positive Will of another person, and hence it logically or in thought undoes Will itself as universal, which is just the State with its Law. For the State is Will actualized, existent, whose end is to will Free-Will through the Law. So the negative Will of the individual falls necessarily into conflict with the State, which, if it is

to exist, must overcome this negative power against itself.

3. *The negative Will negated. — Punishment.* The nature of Punishment has been much discussed, since some kind of it belongs to the Family, to the School and to other Institutions as well as to the State. The subject usually takes the form of the question, What is the end of Punishment? Is it to deter others, to improve or reform the criminal, to protect society, or to pay back to the doer his deed in the way of retribution? Punishment has in it something of all these matters, yet something else too. The object of Punishment as the work of the State must be to secure Free-Will, for this is the object of the State.

The violation of the Free-Will of the individual involves three violations: first, that of the person violated; second, that of the State with its Law; and third, that of the violator himself. The wrong-doer does three wrongs — to another, to the State, to himself. The complexity of the thought of Punishment as the negation of the negative Will lies in the fact that such negation must be threefold. First, the wrong done to the person must be undone, if not really, at least ideally; second, the wrong done to the State must be undone by the action of the Law; thirdly, the wrong done by the violator to himself must be brought home to himself in its full negative na-

ture. Thus, as every wrong involves in its process three Wrongs, so its punishment involves in its process three corresponding Punishments to undo these Wrongs ideally at least, for they cannot always be undone in reality.

As to the wrong-doer, his punishment is not merely the right of society to protect itself against him, but more deeply still, it is his right to be punished; punishment is his personal right. It is his act of Free-Will to destroy Free-Will; punishment is simply the carrying-out of his Free-Will to its complete result, and is the absolute requirement of his freedom; he would not be free unless punished, and is not free till punished. To be sure, the criminal would gladly escape from the responsibility of being a free agent, but the State will not let him, it compels him to be free, and gives him his own.

The primal starting-point of violation is in the Free-Will of the wrong-doer who in such act is negative to his own Free-Will. As the function of the State is to secure Free-Will, so it must not fail to secure this negation of Free-Will to the criminal, for just that is his free act. Therein also the State affirms itself and the validity of its Law. If the wrong-doer is fined or sent to the penitentiary, his Free-Will is negated, but only because it is negative and decrees its own penalty, even if this penalty is enforced by the State. But the State could never condemn him, unless

he had condemned himself beforehand. The outer Law only reaffirms the inner Law of the individual's own Free-Will.

So the State in Punishment keeps to its function of securing Free-Will, in three forms: that of the person injured, that of the injurer, and that of itself as Will actualized. For all violation of Free-Will, as already stated, violates the assailed and the assailant and also the Law. Justice arraiging such a wrong-doer will declare to him: "You willed to destroy Free-Will in your fellow-man, you willed to destroy it in yourself, you willed to destroy the Institution which secures Free-Will to all; this punishment is what you have willed."

The criminal may not consent to his punishment, still he wills it through his deed. It does not necessarily follow that he will reform after punishment though that would be the rational step. The negative deed of his has been negated; why should he not now become positive in Will? Because he is still free and can persist in his old ways, defying experience and ignoring reason. Reformation is the hope of punishment but not necessarily the fulfillment.

Punishment is a great stumbling-block to our tender-hearted sentimentalists, who seek to get rid of it under one pretext or another. But the consequence of a denial of punishment is a denial of the State and a surrender of the innocent to the lawless; yea, more deeply still, it is a denial

of Free-Will in man. If I take away his right to be punished — and it is his sacred right — I treat him as unfree and irresponsible. Punishment, of course just punishment, is the counterpart of freedom, the other half of it, so to speak, the negative half, which it has to contain in itself. The grand discipline of the individual and of the race has been punishment, which brings home the consequences of the negative deed, that is, the deed negative to freedom.

The Free-State must secure Free-Will through punishment. The death-penalty inflicted by the State has often roused protest. Should the State slay the murderer, doing to him what he has done to another? The murderer destroys Free-Will in its total circuit; is he to have his deed through the Law, or is he to be the exception? It is very difficult for the State to make any such exception without striking at itself.

Moreover, the negation of the negative Will of the individual must be the work of the State, not that of another individual, who would thereby commit a new violation. The Law as universal is to visit upon the wrong-doer the universal consequence of his act in punishment. This is a function of what we have called the Negative State: to negate the negative act of the individual, and make him positive even under compulsion, which is the case when he is put into the workhouse or penitentiary, for there his

Will is not destructive, but produces something. We may state the same thought thus: the Single-Will when negative is not to be negated by a Single-Will which is personal, and which thereby becomes itself negative and liable to punishment; but the negative Single-Will is to be negated by the All-Will (State) which is impersonal and returns the deed not through one person, which is private revenge, but through the whole community voiced by the law. And we must remember that this law enforced against the wrong-doer is his own inner law, being derived from his deed, and that without the sanction of this inner law, the outer law could not rightfully touch him. So much for punishment, which in thought restores the positive Will with which we started, having gone through and negated the negative Will, and therein completed the round of the present stage. This we have name Litigation, being, in general, the sphere of individual conflict which requires the State for its mediation. The whole shows the Negative State in its first immediate relation to the individual, making itself positive through its own inner process by which it secures justice. Such is the Negative State in Peace or in its peaceful vocation.

But the State can violate the State, just as we saw in the case of individuals; a State can become negative to another State, and a new

conflict can arise, that between States. Thus the legal war settled by the State is now thrown up into a conflict among the States themselves, which is real War, different from the preceding legal War, which we treated under the name of Litigation.

II. WAR.—The negative nature of the State becomes explicit in War, as it seeks in some manner to negate another State or possibly a Party acting as a State. Both sides then engage in a contest which is usually settled by one subjecting the other. So there is here, too, a judgment and a Supreme Justiciary, deciding the destiny of States.

War may spring from the wrong done to a citizen by a foreign State, which, violating Free-Will in a stranger, calls up the defender of his Free-Will. Thus a State, becoming negative, is negated by a different State. Such conflicts often start on the border, where the territorial limits of the two powers easily rub against each other, begetting friction and sensitiveness in every part of the body politic. Ultimately, however, it is the two national spirits which grapple in War.

History has largely been a record of Wars, in which one State, for a time at least, is the punisher, is the negative power which negates other States as negative. The State destroyed receives judgment from its destroyer, who is in

turn to receive judgment. A line of States, first negating and then negated themselves, is the grand funeral procession of the World's History. On this side the tremendous negative might of the State has made all Time and the whole Earth its battlefield.

A vast subject, but here we shall attempt only a brief classification of Wars.

1. *Outer War*, which is the conflict of State with State as Tribe, City, Nation, Empire. Independent States strive for mastery, others seek independence through War, which is the birth-pang of nationality separating itself from its parent. But not only Nations and Empires, vast continental epochs come forth in War, as not Hellas alone but Europe was born historically through the Persian War recorded by Herodotus, born mythically through the Trojan War sung by Homer. The birth of the Occident took place in the American Revolutionary War, quite without historian or singer, at least in the Greek sense.

The outer War has a tendency to turn inward, the State which assails another State, assails itself in principle or as State; what it does to its neighbor is pretty certain to come back to itself through itself.

2. *Inner War*, which usually goes under the name of Civil War. The State divides within itself and becomes two States, or two political Parties, each of which seeks to undo the other.

The negative State now separates into two negatives trying to negate each other. A Party refuses subordination to the Party in power and starts a Rebellion, which if successful becomes itself the Party in power, whose principle of Rebellion is apt to be sooner or later applied to itself.

After the birth-war of Greece against Persia comes the inner conflict of its City-States with one another. Rome after its great outer deed of conquest of the world had to pass through a great inner struggle between Pompey and Cæsar. Europe, medieval and modern, has had its share of Civil Wars. Nor was America spared after her birth-war from a terrific internal struggle.

The Inner or Civil War may destroy a State, but usually it is a new birth of the State, giving to the same a new principle and a new life. The effort of Will in the People to put down its own negative element continues after the struggle and makes the State over with fresh power. Again it moves outward in conflict, but with a new purpose.

3. *Wars of Civilization.* These have been mostly carried on by States which have been purified through internal conflict. A State must have the power to master its own inner negative before mastering the outer negative in other States. The War of Civilization is waged by some form of the universal State which subjects

or absorbs individual States, that is, negates their negative element. The great ancient and mediæval Empires (Macedonian, Roman, Frankish) carried on wars of civilization, which were a conquest of barbarians by civilized peoples united in one State. The group of Nation States in Modern Europe are still imperial, not so much against one another since Napoleon failed in his European Empire, but against other portions of the World — Asia, Africa, and the Islands of the Oceans, America being left untouched on account of the Monroe Doctrine.

The War of Civilization is an outer War but not that between two individual States simply; the State is now the bearer of the new idea in its onward movement against the individual State as uncivilized or reactionary. Still such a War assails the State, and so has in it a negative element against Statehood, which will bear its fruits in time. The State which takes up a War of Civilization will have to pay the penalty, though it will also get the reward.

All wars have an inherent tendency to pervert the State which carries them on successfully, for it must assail a State, and so assail its own principle of Statehood, though this be embodied in another State. Thus the negative power of War with its destruction passes from without to within the State, which then shows itself destroying itself, destroying its own end as State. This is

the perversion of the State, wherein the Negative State has become internally negative, that is, self-negative. Such a condition is not that of open Civil War, as in this the State may not only be not perverted, but may be seeking to put down perversion.

III. THE PERVERTED STATE.— This is a new phase of the Negative State, which becomes perverted from its true and rightful career when it does not negate the negative Will, but permits or even aids it in its assault upon the positive Will. If we here go back and look at the first stage of the Negative State in Litigation, we find that now it is undoing not the wrong-doer but the wrong-sufferer, and is itself inflicting wrong.

At this point we can see that the State has really become self-negative, destroying its own end. For the State with its Law exists to secure Free-Will, but in the present condition it assails and undoes Free-Will as positive. Thus the last phase of the negativity of the State shows it in self-dissolution. Of course this comes through the individual as official administering the State negatively, that is, in a manner destructive of its end. Every Form of State will manifest this negative element, though in different ways. Finally the individual turns State-destroyer, becoming negative to his own and to all States, his soul being filled with their negativity, probably through bitter experience. The counterpart to

the negative Russian nihilist seeking to destroy the State is the negative Russian official administering the State. These leading stages of the Perverted State we shall hastily glance at.

1. *Anarchy.* The State may be simply passive through impotence or through corruption, and let the negative Will of the individual have free play. The Administration of the State is anarchic when its official no longer functions for the Whole, but for the Party, for himself, or for whoever buys him. Thus the State when corrupt is one continued assault upon the positive Will of its citizens, whereas such attack should be upon the negative Will of the individual. In time this corruption extends to the people who soon reduce the State to literal Anarchy and become themselves anarchic, acquiring the conviction through experience that the State is inherently negative to the positive Will and not to the negative Will.

2. *Anarchic Forms of the State.* Each positive Form of the State has a negative or anarchic counterpart. This lies in the deepest nature of the State, since it has an inner element of negativity, whatever be its form, democratic, aristocratic, or monarchical. In fact the grand problem of the State and all government is to turn the negative element which lies in its very soul against the right object, and to prevent its abuse, often called the abuse of political power.

Thus each Form of State will have its own kind of Anarchy, as it has its own kind of Constitution, since the latter can be negatively as well as positively administered.

It seems to have been the presence of the negative element in the ancient Greek City-State, especially of Athens, which stirred Plato and Aristotle to write their works on Political Science. Both of these thinkers bring out strongly the forms of the Perverted State. Plato after unfolding his ideal Polity, passes in Book VIII. of his *Republic* to a consideration of the negative Greek State of his day. Aristotle in one of the best known passages of his *Politics* (Book III. c. 7, 1279, a. b.), says that there are three right forms of State, Monarchy, Aristocracy and Polity (Timocracy in *Ethics Nic.* VIII. c. 10). Corresponding to these are three perversions, Tyranny, Oligarchy, and Democracy. This is a very important distinction as it grounds the division into the Positive and Negative State, which division thus goes back to Aristotle, who, however, did not employ it in ordering his work. Still anarchic Forms are but a small portion of the total sweep of the Negative State.

We are next to behold the perversion of the State going over into the individual citizen, who being plundered and wronged by his own Government, comes to have no faith in any Government, and seeks to destroy it universally. When

the State is administered negatively, we see man becoming negative to it, and seeking to tear down the institution which his race has slowly upbuilt with the Ages.

3. *Anarchism.* The Perverted State has now brought forth its final perversion in perverting man from a State-making to a State-destroying animal. The State is the greatest of all educators, and it can educate negatively as well as positively. The conviction must set in that Government is purely negative, a bad thing for justice, for human welfare, for doing the business of the people. Thus a negative, that is, a corrupt or tyrannical Administration of the Government, leads not only to Anarchy, but to Anarchism, which is a destruction of the germinal principle of the State in man. The fountain-head is thereby corrupted, the constructive process by which the people build a new State if the old one gets out of order or goes to pieces, becomes rotten, barren, indeed actively hostile. Such in the widest acceptance of the term we call Anarchism, which pertains to the conviction of the people or a portion of them that government is negative to freedom and justice.

It is important to note that certain mild forms of Anarchism are held by persons who would shrink from calling themselves anarchists. Certain views of the State which may well be designated anarchic in their tendency, though not

strictly anarchistic, have been extensively held among Anglo-Saxon peoples, who, on the whole, have shown but little aptitude for Anarchism proper. To this last stage, however, we may observe a kind of deepening from milder forms.

(1) The conviction rises and the doctrine goes forth that the State is to interfere just as little as possible with the individual, protecting him (like a policeman) in his exploitation of self, otherwise keeping hands off. This is the famous principle of *laissez-faire*, so universally held by political economists, who as a rule are not very good political philosophers. This is no just conception of the positive function of Government, but merely a negative — hands off. That the State is what makes actual the Will, has here no place; the positive function is left out, negated in thought. This is perchance the first or immediate form of Anarchism — mild, not yet acrid, but a kind of aloofness, which makes the State's chief duty to do nothing. It had always hitherto the habit of doing too much; let it now see how little it can do, till finally this do-nothing will become a be-nothing, which is its true destiny.

(2) The second form of Anarchism holds that the State is to be tolerated, and is even sometimes to bestir itself, but it is, notwithstanding, an evil, "a necessary evil." The *laissez-faire* man would quite wipe out Government, or confine it to police duty mainly; but the necessary-

evil man would use it a little, yet as negative, and seemingly because it is negative. This still more deeply ignores the positive nature of Government; in fact, it is now regarded as an active negative force. Without denying that there is such a force residing in all Government, this cannot be its fundamental fact unless the State be an Inferno — the place and means of punishment for fallen man. Thus the Individual has completely separated himself from the State as the Good is separated from the Evil; they are two opposites.

But is evil necessary? Specially this evil of the State? Is it not to be abolished or so completely transformed as to change its nature? We pass to the third form of Anarchism with this question.

(3) Nihilism is the most active and the most logical form of Anarchism, the true outcome of *laissez-faire* and of the doctrine of the necessary evil of Government. The great object is to let the State do as little as possible, by way of interference with the individual Will. The completely free man must do without the State; hence to be free he must destroy it, since the State in all lands, even the uncivilized, will assert itself. Thus Nihilism is a return to *laissez-faire* with a vengeance; not only is the State to keep hands off, but is to have its hands cut off, since these hands have no other purpose than to intermeddle

with other people's inalienable rights, their freedom.

The outcome of Nihilism is not simply the destruction of the State but of all Institutions — Family, Society, Church. Man is to be stripped of his institutional life, and in this utter spiritual nakedness he is somehow to begin over again. But what the negative individual can even begin in the way of social order is difficult to see, for the atoms are all mutually repellent, as their end is to be free. Here again we may note the profoundly negative element in freedom (for a fuller discussion of this subject, see our *Social Institutions*, pp. 278–286).

We have now traced the Negative State through its main stages, from its being the process of the Good in the administration of the Law, through its double character in War, to its being the process of the Bad in transforming the citizen from a positive, institutional Self to a negative, anti-institutional Self. Undoubtedly, personal characteristics play into this process. Some men seem to be Nihilists by nature, some easily turn that way; but a large mass of persons become nihilistic only through the training of their Government, which may be educating its own people to overthrow it as perverted and destructive of its own end.

Thus the negativity of the State can reverse Aristotle's famous declaration, and transform

man into a State-destroying animal, veritably a wild animal in such a case, all the more ferocious because of his relapse to savagery. Here is the final result of the negative, descending movement of the State; the individual is reduced to his primitive condition of institutional nudity, somewhat like naked old Lear in the forest.

But just at this point the words of the old philosopher will show themselves valid once more: Man is a State-producing animal. The ascending evolutionary stream of human nature sets in and continues to rise and unfold into the various progressive forms of the political institution up to the highest. From the very fact that man has Will he must be a maker of Institutions, and so a State-builder. Endow a man with Will and he cannot stop short of the State (see preceding pp. 22-29). Such is the germ which underlies even negation; to destroy Free-Will requires an act of Free-Will, which must assert itself finally as positive in order to be truly itself; otherwise it will not be at all.

Thus the Evolution of the State will show itself as the affirmative response and the counteraction to the Revolution of the State, to the negative element tending to its overthrow. In general, Evolution exhibits the grand positive movement of Nature herself, and its doctrine came at a time when man needed it to restore

himself out of his deeply negative, skeptical condition.

III. EVOLUTION OF THE STATE.

Under the head of *The Forms of the State* (see preceding, p. 410) we have given already a general outline of the movement of the State, starting from its primal sources in the Family, and passing through many stages till it reaches its latest manifestation in the Occidental State. Such an outline shows, in general, the substructure of the World's History, or of the History of Civilization, which unfolds in and through all Institutions, but specially in and through the political Institution. This phase of the subject we shall not develop further at present.

There is, however, another phase in the Evolution of the State to which we shall devote a little time. Man has made many efforts to construe the State in the past, from the old Greek world down to the present. Thus we find an Evolution of Political Science running quite parallel with the Evolution of the State, at least in Europe. The human Self is to become conscious of itself in all its works, if it fully realizes its own nature. The Greek, the beginner of Europe and of philosophy, will begin the philosophy of the State.

Already in Herodotus, the Father of History, we see that there was a very lively political discussion concerning the Forms of the State, early

in the fifth century B. C. He introduces (*History*, Book III.) the Persian conspirators deliberating about their future government, and setting forth in speeches the merits and demerits of kingship, aristocracy, and democracy. Of course this is a fictitious scene for Persia, but a true picture of what was going on in Athens every day, where Herodotus dwelt a part of his life. Thus we catch an image of the living background to the political speculations of the coming philosophers, Plato and Aristotle, whose chief works on the State belong to the next century (fourth), when the Greek City-State had passed into its decline.

I. Plato's *Republic* and Aristotle's *Politics* remain to this day two of the most important books on Political Science. Both may be said to have a common object: to reform and reconstruct the City-State of Greece, which they deemed the source and the hope of Greek civilization. Hence each of them has his own ideal polity, Plato more definitely and organically than Aristotle. Both would place at the head of the State an aristocracy of intellect and virtue; both have a low opinion of labor and the laborer; neither knows exactly what to do with the People, and both are, on the whole, enemies of popular government. Both are narrowly Greek in their view of nations which happen to be non-Greek. As already said, both are in spirit reformers,

and as the means of reform both place great stress upon the education of the youth, which seems the chief way of restoring the decayed Greek world to itself out of its degeneracy. It may be said, too, that the forms of State proposed by both philosophers are essentially hierarchical, with the thinking ruler or rulers at the top, quite absolute in power, and with the other classes ordered in separate layers to the bottom.

Putting their chief stress upon the internal affairs of the single Greek City-State Plato and Aristotle pay little attention to interpolitical relations, and still less to international relations. It has always excited surprise that Aristotle, one of the keenest-witted philosophers, who once lived at the court of Philip, and was the teacher of Alexander, shows no adequate appreciation of what the Macedonian supremacy meant to the City-State of Greece. The latter had really run its course and was approaching the end of its independent career. But Plato and Aristotle thought it could be reformed and restored somewhat as it was in the preceding centuries. But the Empire-State had arisen as the new world-historical principle, and, embodied in Macedon and Rome, proceeded to swallow, one after another, all the single City-States of Greece.

On account of the simplicity and singleness of their City-State, Plato and Aristotle are still to be studied by the investigator of Political

Science. The Society of Greek City-States shows the atomic starting-point of European political association, the atoms being these small active struggling independent communities. The heathen philosopher sought to construct an ideal State, but this ideal was not realized in antiquity; it had to wait several centuries when in a new order of the world it takes a form of reality.

II. This is the Church, which, in a number of points has a marvelous similarity to Plato's *Republic*. The latter, freed of its secular side, can become ecclesiastical in the medieval sense. The government of the philosophers in the State is supplanted by that of the priests in the Church. Plato destroys the Family for the sake of the State; the Church enforces the celibacy of the priesthood for a similar reason. Poverty or the renunciation of Property plays an important part in the organization of the Church, and Plato deprives his rulers of worldly possessions. The hierarchical order with its absolutism is common to both.

The Church is, accordingly, in several most important respects, Plato's *Republic* realized. When we add that the germinal doctrine of Hell, Purgatory and Heaven is also found in the same work of Plato, with passages distinctly suggesting repentance, remission of sins, and the future state, we begin to have some notion of the extent

of the Platonic contribution to Christianity. The Greek Fathers were deeply imbued with Plato, who came to the Western or Latin Church through St. Augustine and his *De Civitate Dei*. Thus it resulted that the Roman spirit of organization realized practically a new religious Institution out of the Greek ideal.

III. In modern times the political treatises of the ancients were taken up afresh and studied with new zeal and insight by the Renaissance. The result is a long line of works on Political Science from that period down to the present, many of which are of great value. It does not lie in the scope of the present undertaking even to attempt any ordering and estimate of these numerous authors; we shall mention only two of the more recent and more significant, who have a direct spiritual connection with the present work.

Rousseau. More completely than any other man Rousseau stands at the center of the modern theory of Institutions, especially of the political and the educational. Moreover he has in him both elements, the positive and the negative, inherent in all Institutions. Each element has reproduced itself in the most striking manner; the destructive element found its culmination in the French Revolution, of which he is often called the father; his positive influence may be traced in the new theory of the State evolved by

German philosophy, and had also something to do with the new actual State unfolded in the Constitution of the United States. In the preceding exposition we have had occasion to allude repeatedly to Rousseau (pp. 31, 33, 72, 344), especially as he is the man who goes to the bottom of the institutional world and founds it on Will.

One of the deepest facts in Rousseau is that his basic principle of the State is psychological rather than metaphysical. He speaks of an association having an Ego or Self (*son moi commun*) whereby it is "a moral and collective body," an institution (*Contrat Social* I. 7). Yet this institution, in order to have "a real life" as distinct from its body, needs a particular Ego (*un moi particulier*) for its administration. Thus the author of the present book was anticipated in his supposed peculiar nomenclature by the author of the *Social Contract*. To be sure Rousseau shows no developed psychology through which he organizes his total institutional structure, still he casts intuitive glances to its very foundation. He knows the difference between the All-Will (*la volonté générale*) and the will of all (*la volonté de tous*), that the former is properly the institution while the latter is not, but may be its creator or its destroyer. The deep meaning of freedom is also felt by Rousseau when he says: "To renounce freedom is to re-

nounce the quality of manhood." The great end of all association and of all institutions he sees to be freedom. In his formula of the Social Contract (I. 6) he declares that each member "uniting himself with all is to obey only himself and to remain as free as before" through the association or institution. This is specially the point which Hegel will develop with great power and an ability to organize thought far beyond Rousseau, who, however, gives him the germinal principle. Yet the drawback must be stated. Hegel will largely transform the psychological basis of Rousseau into his philosophical or metaphysical formulation—a doubtful improvement, in our judgment, since we think that Rousseau's psychological germ ought to be developed psychologically.

Some of the limitations of Rousseau may be noted. He does not believe in representative government, and sneers at its employment by the English. What would he have said to America? He thinks that a free State must be small and that all the citizens should assemble together and govern immediately. In this matter he is far, far behind; he shows, in fact, a relapse through 2,000 years to the City-State of antiquity, even if he had Geneva and the Swiss cantons in mind. Then come the difficulties which arise in regarding the State as based on Contract. Then he refuses explicitly to touch the external relations of

his State, regarding these as an object too vast for his vision (*pour ma courts vue*). With this fit of modesty he winds up his book on the Social Contract, apparently not recognizing that civilized Europe from its Greek beginning down to the present has been a Society of States in one form or other, and that this Society has been the main determiner of the historical State. Still he has given us the most fruitful thoughts in modern Political Science. And now we may turn to that man among his successors who has brought these thoughts to their highest European development, though later writers have made important contributions.

Hegel. His name has been already mentioned in connection with Rousseau, whom he in many respects, though not in all, transcended. In the present work there are numerous direct and indirect allusions to his views. It is Hegel who says that the State is "the actualization of Freedom," and also that it is the "Will actualized." The thought he doubtless derived from Rousseau whose "Universal Will" and "Particular Will" are also very often used by Hegel. The influence of Rousseau upon Kant was likewise great, and the French thinker may well be deemed one of the chief sources of modern German philosophy.

The development of the State is, however, much more complete in Hegel than in Rousseau.

The German thinker had a concrete State (the Prussian) before him, while Rousseau saw little in the France of his day to correspond to his idea. Still he had had the experience of the City-State in Geneva, and underneath his whole political consciousness lay the little Swiss world, with its cantonal governments.

Hegel calls the State an organism, "that is, the development of the Idea to its divisions." (*Phil. des Rechts*. s. 324 — this work we shall hereafter cite by its initials). Such divisions (*Unterschiede*) are "the different Powers of the State," by which he means in a general way the three Powers, which with him are the essence of the Constitution, making it rational, since this division shows the State dividing (or organizing) itself "according to the nature of the Conception (*Begriffs*)" which determines itself within itself (*P. R.* s. 344-5).

So Hegel's State has the Three Powers unfolding themselves out of the Conception of the State, which Conception, we may here add, is not distinctly the Ego or Self, but is projected as a metaphysical entity producing the State. But what are the three powers?

1st. The Legislative Power.

2d. The Administrative Power. (*Regierungsgewalt*.)

3d. The Royal Power, "in which the different Powers are grasped together into an individual!

unity which is the beginning and culmination of the Whole—Constitutional Monarchy” (*P. R.* s. 348).

This is not our well-known distinction into legislative, executive and judicial Powers. In fact, the judicial Power is not a co-ordinate Power in Hegel’s State, nor is it in any leading European State of to-day. It belongs to the administrative branch, along with the Police Power (*P. R.* s. 372). How different this is from the American conception of the judicial Power the reader can find out by comparing it with the third Article of the American Constitution, which places Justice co-equal with the executive or administrative branch, and not subordinate to it.

As to the order of the Three Powers (certainly an important matter for their true comprehension), Hegel is not consistent with himself. In the statement just given he places the legislative first and the royal last; but when he comes to the special exposition, he begins with the royal and ends with the legislative. This destroys the inner necessity of his deduction of the Three Powers of the State (*P. R.* s. 354). The proceeding is the more strange, since Hegel puts such great stress upon the order of the Conception (*Begriffs*) that he rejects the threefold division into legislative, executive and judicial because “the judicial Power is not the third element of the Conception” (*P. R.* s.

347), which should be "individuality" and hence the monarch. But after insisting on the necessity of this order "of the Conception," he violates it on the next page (*P. R.* s. 348), by placing the royal Power first instead of third.

Hegel's monarch is not elected but is given by Nature, by birth, so that his constitutional monarchy cannot be altogether constitutional. Nor does the monarch need to have "any particular character," good or bad, small or great; "he has to say only yes, and to put the dot on the *i*" (*P. R.* s. 365).

The monarch is not personally responsible for his actions, yet he is given the power of selecting all his officials, so that he is the head of the bureaucracy which is well-nigh absolute, being responsible only to him. The Classes (nobility, etc.) are maintained and declared to be rational.

Hegel's developed State is far less creditable to him than his germinal thought of the State. In the latter he took Prussia for a model (and that too in a time of reaction, about 1820, when his book was published); in the former he followed Rousseau. He declares the end of the State to be the "actualization of freedom," but his developed State does not show freedom actualized in a very high degree. Hegel's State is still an absolutism essentially, though modified by certain English ideas. He seems unaware of the American Constitution, though it had been work-

ing over thirty years at the date of his book. For this he ought not to be blamed perhaps, as Europeans knew almost nothing of the American State till Toqueville told them. Still Hegel put great stress upon the reality, declaring in his famous dictum that "the real is the rational;" one may wonder why he did search a little for the latest reality in the unfolding of his World-Spirit. But after all is said, Hegel truly represented the German people; his conception of the State is substantially theirs, as time has shown. Fries bitterly said that Hegel's book did not grow "in the garden of science but on the dung-hill of servility;" the saying, however, is not just, though we must confess that Hegel was not in advance of his time or country, but rather narrowly limited by both. The English or American reader of Hegel's work on the State has a criterion in mind which Hegel did not and could not very well know.

Such is Hegel's inner development of the State. We are next to consider his view of the State in its external relation to other States, particularly in the European Society of Nation-States. "The first fact of a State is its independence which it is to assert against other States." The Property and Person of the individual must be taken by the State according to its needs; this negative side it shows to its own citizens, who, however, will what the State wills in orderly times. Hegel

defends war "out of which States come forth not only strengthened but with an inner peace before unknown" (*P. R.* s. 412). A standing army he calls for, with its military class, which must really rule the State. All this means the military State, like Prussia.

In the European Society of States there is an international law, they make contracts, and treaties with one another, but there is no Supreme Court to interpret or enforce such a law or the treaties, which are kept or broken according to the caprice of the Single-State. Hence the only restraining power that is final in this Society of States is war, for which they all must be always ready. How the American Constitution eliminates this terribly negative element of the European State has been already unfolded. But for Hegel such a political condition seems the highest; he rejects the idea of a perpetual peace secured by a federation of States or Kings, which was proposed by Kant, who had gleams of a Federal Alliance as the solution of the European difficulty.

Hegel declares that the highest law for the Single-State is its own welfare in its own opinion. "The States in their independence are particular Wills against one another" (*P. R.* s. 420), and each is to follow its own self-interest, not its sense of justice. Hegel declares that the principles of morality belong to the relation of individual to individual but not to the relation of State

to State. Each Single-State in this European Society seeks to dominate its neighbor for its own advantage, which is the end of the State as here given. Each State for itself, and the Devil take the weakest, which Devil is its stronger neighbor.

No doubt Hegel philosophizes his State from the real European condition of his time, for "the real is the rational." Still we may note for the sake of comparison what he does not see, yet was to be seen already in his time as a reality: his particular European Nation-State is to be freed of its national caprice and is to be institutionalized through a new Society of States forming one State or State of States, which secures the inner Selfhood of each State without its dominating other States or being dominated by them. But such a universal State or State of States lay outside the ken of Hegel. Still he recognizes that there is something above the Single-State, calling it into existence, upholding it in its great career, then destroying it.

This brings us to the Hegelian conception of the World-Spirit, which has been one of the most significant and fruitful thoughts ever uttered concerning History. This World-Spirit is greater than the Single-State, using the latter as its instrument, and thereby making it a world-historical State, such as Egypt, Greece, Rome were successively in antiquity, each of which had

its period of rise, bloom, and decline, in accord with the decree or the Will of the World-Spirit.

It should be added that the individual man may likewise be the bearer of the World-Spirit and carry out its command against his State or the Religion of his time, like Socrates and Christ. In the political sphere it has also some mighty individual representative executing its behests in regard to the State, like Caesar and Napoleon.

Now the World-Spirit is essentially a judge, and the World's History is a world-judgment over the Nations, "whose Law is the highest of all Laws"; or, as it has been pithily uttered, *Weltgeschichte' ist Weltgericht*. In this tribunal of Peoples, then, the World-Spirit pronounces sentence, out of its own caprice, as far as we can see, or out of its own notion of right, if right can be here applied.

In the Society of States Hegel leaves each Single-State to its own caprice or arbitrary judgments. Says he: "In the relation of States to one another is seen the animated play of passions, purposes, talents and virtues, right and vices, in which play the ethical Whole, the independence of the State is exposed to external accident" (*P. R.* s. 420). But behind this spirit of accident is the World-Spirit, calling forth or possibly destroying the State.

Such is the outcome: the Single-State acting capriciously for its own welfare, is rewarded or

punished by the World-Spirit, which reward or punishment is also ultimately an act of world-historical caprice. Hegel's World-Spirit (see its evolution in *P. R.* s. 422-6), is an absolutist in true German fashion, a kind of Kaiser (*Weltkaiser*) over all the Single-States, ruling, trouncing, rewarding or cashiering them, according to his own sense of duty, but with absolute arbitrariness, so that even the undoubted good which he brings is felt to be tyrannical. Herein Hegel was true to the European reality before him, namely, the Society of Nation-States, each with the imperial idea. Over this struggling mass of colliding nationalities Hegel places a new Emperor, the Emperor of all Emperors, the World-Spirit, confirming or destroying according to his own particular Will, and thus realizing himself in a series of world-historical States rising and falling.

So much for Hegel's ultimate development of the State. Now we are to see that the World-Spirit has transcended the philosopher's conception of it; no longer is it something outside or over but within the States, and is actually existent as the universal State creating them yet created through them. It is no longer a capricious World-Spirit which capriciously punishes the caprices of the Single-State, perhaps justly but still not institutionally and hence tyrannically. Hegel's mighty conception of the World-Spirit is to

remain, it cannot be cast away; still it too is in the evolutionary process, it is to be transformed and transcended, passing from its European to its American manifestation. The World-Spirit has found out a better way, which is to organize all these conflicting Single-States into a World-State corresponding to itself, which will prevent the great violations committed by States against States, prevent the State from its own inner self-destruction. So it will watch over the birth of the new Single-State, determining the same by Constitution and Law. Now the World-Spirit embodies itself anew in a State-producing State, in an actually existent Institution, and thus gets rid of its caprice, largely though not yet entirely. It lays down its law beforehand, which is in essence that the Single-State must will actualized Will, not assail it or destroy it, and this law is uttered and enforced from the central Institution or from the State of States. In such fashion the capricious European World-Spirit of Hegel has unfolded into the American institutional World-Spirit.

Still in the latter case we must note the limitation. The American Union is likewise a particular State against other particular States; after institutionalizing the Single-States within its vast boundaries, it too becomes a Single-State taken as a Whole. Thus it has to drop back into the society of conflicting World-States, till its prin-

ciple be made universal, which will happen only when there is a United-States of the World. Such a universal State appears to lie far away in the future, though the prophecy of its coming has long since been uttered, and its prototype would seem to be already in existence.

It may be here added that Hegel's State is in full correspondence with Hegel's Philosophy, which is not only absolute in name, but absolutist in spirit and also in form. That Conception (*Begriff*) of his, to which allusion has been repeatedly made in the preceding account, may be called the Emperor of Philosophy, determining all notions of things and philosophic categories. The individual Self (or Ego) has nothing to do but to look on and see it work and obey its behest, according to Hegel. Still it is just the individual Self which is functioning this Conception, and really is this Conception. When Hegel evokes the Absolute Spirit as the creator of the world and of himself, he has given only half of the process, for he has left out his own creative part. In his Logic he shows the Logos (or universal Reason) unfolding and ordering the fundamental categories of all Thought, while he simply "looks on;" but while the Logos generates all Thought, he somehow forgets to include his own Thought generating anew just this Logos.

Here lies the undeveloped element in Hegel, in fact in all European philosophy from the begin-

ning. It projects an absolute principle which is to dominate and even create man, yet what is omitted is that man has to re-create it in turn, else it would not be. This omitted element in philosophy, always present but unrecognized, is now to be fully recognized in its creative nature. Philosophy as a European discipline was imperial, and sometimes imperious; but it must be democratized with other disciplines, whereby it is no longer philosophy strictly but psychology. In America the State too is imperial and commands the People, who obey its law; but the People are also imperial and command the State, creating it anew if they so will. And the Single-State as we have often seen in the preceding exposition, has over it an absolute State (the Union) which creates it, yet it has to return and re-create continually that absolute State, its creator.

Strictly speaking, there can be no philosophy of the American State; the latter requires a new way of thinking for its adequate comprehension, a way of thinking not given by philosophy as a European formulation of human spirit. This does not mean that philosophy is to be cast to the winds, but that its process must be completed by psychology, which in its true form gives the total movement of Spirit both creating and created. The Occidental State is the realization of the Occidental system of Thought, which, though already active, has yet to be unfolded fully and formulated in its own right.

APPENDIX.

THE AMERICAN STATE.

[This essay was first printed in the *Western*, a St. Louis periodical, in a series of articles which were collected into a pamphlet in 1874. Thus it goes back nearly thirty years from the present date (1902) for its composition. The author has been asked several times to have it reprinted, but refused as he wished to complete it, though such completion of it has been deferred so long that it seems now quite different from the preceding book. Still those who are interested to do so may trace the germs of the book in the essay, though the latter shows frequently the political discouragement of the time in which it was written, as well as certain early tendencies of the writer, which may be of interest to some of his friends.]

INTRODUCTORY. There is to-day, without doubt, a far greater portion of the people of the United States who have lost faith in republican institutions than at any period since the adoption of the Constitution. It would seem almost as if the victory of nationality in the late civil war was purchased with death, as heroes have fallen in the moment of victory. What we gained in that struggle is manifest and has been echoed and re-echoed from press and hustings till it is familiar as a nursery-rhyme; what we lost is beginning to make

itself felt till concealment is no longer rational or possible. That something very essential to the working of free institutions has fled from us is evident; and the reasonable thing to be done would seem to be to find out what it is and replace it if it can be replaced. It is not necessary to repeat here what nearly every newspaper in the land without distinction of party is bewailing; that conscience appears to be banished from the public service, that the administration of government is devoted to a large extent to personal objects, that responsibility in office is turned into a mockery. But what is most appalling is the extent of this corruption. Where it nestled only in high places at the national capital, its distance from the reach of the people might be its excuse, but its slimy folds have enveloped State, county, township, and even the school district, the very humblest of governmental organizations.

It is not our purpose to indulge in a lengthy Jeremiad concerning this shocking decay of public morality, and still less to exhort sentimental slaver about the poor injured people. The people are to blame, they choose their rulers, to them belongs the responsibility of the choice. The greatest freedom implies the greatest responsibility. Let the latter decay, the freedom decays in proportion. The first condition of returning health, is that the people recognize their responsibility, and then they may expect it of their officers. If they are unfit to choose their rulers, then somebody must do it for them, and somebody will do it for them. It now looks not unfrequently as if somebody were doing it for them already.

The present mode of conducting elections comes very near taking the matter out of their hands. It need not be added that such an infringement if not resented is tantamount to a confession of incompetency to choose their rulers and a surrender of their right. The form may be there, the polls may be opened, but everybody knows that the election has been settled beforehand.

The presupposition of the American State is the American citizen. There must be, lying at the basis of all institutions, a national consciousness which wells up and gives them life. The fundamental principle of his nation must be the deepest source of action in every citizen; to it everything else must be subordinated. There is no use of talking about a free State without free men, that is those who have realized in their whole thought and being the idea of freedom. External enfranchisement can not make freemen, namely, can not free the consciousness.

'Tis not the outward bond that makes the slave,
But the base narrow thought within the man.

It is just this national principle which has become obscured by the one-sidedness of the civil war and threatens to become wholly extinct. Now is the time if ever for it to be recalled to the mind of the American citizen. Hitherto he possessed it instinctively. But since the contradiction which assails it has risen in his mind, he must solve that contradiction *consciously*. He can no longer trust his instincts, they have been led astray too far, and besides are never very reliable. He can only return to the national principle through

thought, he must be conscious of and comprehend the rational basis of his government.

All our troubles come from the loss of the true idea of free government in the minds of the people, in other words, from the destruction of the deepest national thought. With it must go in time the realized institutions of the country, for these are vitalized only through the individual consciousness. The instinct of the American nation was its most wonderful attribute, it was always true to its highest thought, though it could never give a rational account of its processes. Nor is this to be said merely of the common citizen, but in an equal degree of the statesman. In action he was always true to the national principle in the profoundest degree, but when it came to statement he employed arguments which would destroy at once the entire system of government, if adhered to, and which were quite the opposite of his action. In American political literature there is not to be found any adequate enunciation and deduction of the American State. Hitherto this perhaps was not so necessary. But at present the only possibility of recovering our principle is by thinking it, by comprehending its logical basis, and all its relations.

To aid in the performance of this work there are two classes of persons to whom, by their occupation, people are inclined to look: the politician and the lawyer. But the politician, even when honest, has never risen above the assertion of the individual,— such is the chief content of American political literature from the Declaration of Rights to the present. Hence, as it is but one step from principle to action, it is but one step

from the absolute assertion of selfishness to dishonesty. It is a harsh and paradoxical statement, but true in its literal sense that, as a general rule, the only difference between the honest and dishonest politician lies not in their convictions but in their conduct, and that the dishonest one carries out his belief to its logical result, while the honest one does not. For the individual is the principle, hence, when there is any conflict between it and the public service, the latter must be subordinate. Corruption in office hence results, and there is nothing to stem it, because there is no national conviction for the basis of reform. Many men, it is true, of deep moral instincts, hate and denounce this corruption, but their very premises may often be taken by the rogue to justify his rascality.

It is utterly idle, therefore, to expect any reform without a radical change in the public consciousness, for all abuses have sprung from that consciousness. There must be a new birth, a new national spirit which will combine the true principles of the old regime with the valid results of the new. The latter have absorbed our attention long enough; it is time to stop the revolution unless it become chronic. The great question is, how? Mere exhortations to morality and honesty can effect nothing; even the rogue unites with the moralizer and says, "Be honest;" indeed, he seems to be the loudest moralizer. No, the seat of the disease must be reached, the conviction must be changed; when a man is held by that, there is no necessity of sermonizing. As long as the nation holds its present conviction things can only get worse.

It may therefore be expected that little assistance

can be obtained from the politician, inasmuch as he rather represents than forms the consciousness of the people.

The second of these classes above referred to, the lawyer, has shown himself equally incapable of stemming the tide of corruption, or even placing upon it any legal limits. Nor from the nature of his calling could anything different have been expected. There is one fundamental principle upon which the legal consciousness rests: that is precedent. "Ask me not what ought to be but what has been," said an eminent advocate. The lawyer's pursuit is chiefly to refer the present back to something in the past, and to point out its similarity or dissimilarity; if it is like the same then it is law, it is right, it is just, if not, the contrary. Hence, the intense conservatism of the legal profession, and hence, we may add, its immense importance to the stability of society. But this conservatism, this adherence to what is old, is also the finite side of the lawyer, and makes him utterly helpless in periods of transition and civil commotion. His whole thought and occupation are concerned with the identity of the present with the past; justice and law reign when the two agree. But mankind do progress, there is such a thing as change and it must be recognized by the laws and institutions of a country, though by revolution.

It is at this point that the legal consciousness breaks with itself and turns upon and destroys itself. For it sees that change too is a valid thing in the world, that its fundamental category, precedent, breaks down, for the present is quite different from everything which has gone before, hence the lawyer now takes change as his

precedent instead of identity. Thus the legal consciousness turns from being the most conservative to the most revolutionary. Will any one deny that the best legal talent South and North led or followed the extremists? Has not the Supreme Court, theoretically composed of the best talent of the profession, assailed the very existence of law by the logical annihilation of property in the *Legal Tender* decision? Nay, in that same decision, has it not destroyed precedent itself by reversing one year what it had decided the previous year? What was law yesterday is not law to-day, but may be to-morrow. Nor is it necessary to revert to the legislative branch of government, the lawyers were the leaders. Another historical instance is the French Revolution. Says Burke: "As soon as I saw the number of lawyers in the National Assembly, I knew all that would follow."

We hope this will not be considered a vulgar tirade against the legal profession. It is in the very nature of things that every profession has its limits, an exclusive study and devotion to it must cramp the mind within these limits and render it unfit for a just comprehension of the total interests of society. Nor are the above remarks true of every individual lawyer; many there have been who were as wise legislators, as great philosophers, as they were good lawyers. We are only speaking of the general consciousness of the profession, the necessary results of its pursuit upon mind taken in the average.

Reformation therefore cannot be expected from the politician for he represents the existing consciousness which is the very evil complained of. Only when this

is changed will the politician change. Nor can the lawyer help the nation out of the difficulty, for unfortunately his fundamental category, precedent, can furnish only confusion, contradiction, revolution ; precedent is now on the wrong side. Perhaps some one may think of the minister in this emergency. But the truth is, he is more to blame than anybody else for the present state of public conscience, it is the legitimate fruit of his teaching. For it was he who transformed the opposition to law into obedience to the Higher Law, this Higher Law being ultimately individual opinion. Thus the whole realm of the Established, institutions, constitutions, laws, the State itself were subordinated to the individual, and every person became a "law unto himself." Therefore the national consciousness began to decay, for that must have the nation as its object ; but the point is, that there is no longer any faith in the nation and national institutions, but only in self. The villain can ask nothing better than to be a law unto himself, and when the public conviction is fundamentally the same, how can he be reached? And if the best and most moral men of the community believe in and preach such doctrines, what can be expected of the worst? Just what has followed and nothing else. It is but fair however to say that many individual clergymen and even whole denominations form striking exceptions to the above statements. But it must remain one of the curious facts of history that the very hey-day of rascality and corruption had its origin in a so-called moral revolution.

There are two capital epochs in the history of American politics, The first begins with the adoption of the

Constitution, the era of the feeling of nationality. There was an immediate, unconscious unity of the individual citizen with his government. At its mention his bosom swelled with national pride, he knew it was the best government under the sun, it corresponded in every respect with his wants, feelings, and hopes, it was an adequate reflection of his consciousness. This was the period of national childhood when there was the simple ethical faith which questions not, but is in the deepest harmony with truth. No doubt exceptions could be found, but they were comparatively few. All political parties reposed upon this national basis, here was the point in which they all united, whatever other differences they may have had.

Now the characteristic to be emphasized is that this harmony of the individual with the government was unconscious, resting in the emotions and not brought about through thought. Nor was there any necessity; the citizen *felt* his country in himself, and himself in his country. It is true there were political writings of theorists and practical statesmen, belonging to this period. To say that they solved the problem of government for thought, would be the greatest mistake; they did not do so for a very manifest reason: there was no problem yet to solve, the contradiction between the individual consciousness and authority, had not yet risen in the national mind.

But it was rising and growing, and great was the embarrassment and consternation of the old school of statesmen. They sought to stem it by make-shifts, by compromises, even by tearful exhortations; in vain, the good old times were gone never to return. This is

not the place or the time to write the history of that great change and its causes: for if such history were written it could give little satisfaction to any *party* at present, for it would have to be *impartial*. Suffice it to say that it was mainly the slavery question which aroused this sleeping contradiction. Slavery had strongly intrenched itself in the law and government; men who opposed slavery began to oppose law and government. On the other hand men who defended slavery declared they would defend it to the annihilation of law and government. These opinions in a special subject necessarily became general dogmas. Hence the resistance to the Fugitive Slave Law was soon generalized into the right of resistance to all law which did not meet the approbation of the individual conscience. On the other hand the legitimate repeal of that law was declared to involve the right of the dissolution of the Union. The point to be specially noted is that on both sides the individual has fallen out with the government, the unity of the first epoch has perished, the citizen has placed himself over against the State, and announces its subordination to himself. For a long period of years the people of both sections were in the process of education by their writers, speakers, newspapers, till at last their consciousness became completely imbued with the above-mentioned doctrine. Both sections were quite at the striking point, both were quite ready to assail their government, for that has been their education for a quarter of a century. There was however a large body of people, the great majority in the so-called Border States located between the extreme sections, who still

cherished the feelings of nationality of the olden time, who were well satisfied with their country, in whose consciousness this break had not taken place to any extent, who therefore would smite to earth any hand that was raised against their government, whether from the North or from the South. But that a collision could be avoided was simply impossible. The only question was which side would first begin, for against it would be arrayed also the Border States. John Brown from the North made the first attempt. But it was too soon, hence he received only "moral support" and no real assistance from his allies. Then the South began, here was an open, general, systematic rebellion. The South thus made herself the aggressor, the Border States threw themselves into the scale against her and decided the conflict. This was not done from any sympathy with Northern principles, or from sharing in the Northern consciousness; these were even more hated than the Southern; the North would have been assailed with equal readiness if it had been the aggressor.

It would have made little difference which side came into power; the government was bound to be revolutionized, for the break in the national consciousness had become universal — was in both parties. It can be of no use to assail or defend, to lament or glorify this state of affairs; the duty of the time is to recognize it and its consequences. The nation had come to an epoch of development, there was a chasm to be passed, a valley of fire, of negation; the great question is now to pass it and leave it behind, and not to be burning forever in Hell-fire, to be always purifying

and never purified, like France, like Mexico and South America, like the Latin consciousness generally.

The third epoch of American political life, the true period of robust manhood will begin when the people have a clear perception of this contradiction and overcome it. Such a conquest can only be accomplished by thought. They must think, comprehend their own national principle, from which they have fallen away. This will be the true return, like that of the prodigal, the stronger for having passed through the contradiction. There will be restored the harmony of the first epoch, together with the great and eternal result of our struggle—national self-consciousness. For instead of the immediate unity between the individual and government, there arises the higher unity mediated by thought, based not upon the transitory element of feeling, but upon an everlasting foundation, the self-conscious reason of the nation.

To study and elaborate this national principle and to bring it to the minds of the people are the duties of the hour, which is the only excuse for writing the series of essays which are to follow.

NO. 2. THE STATE IN GENERAL.—Before attempting to ascertain the nature of the American State in particular, it is absolutely necessary to know what the State is in general. Nor can the manifold functions of the State be comprehended without such preparatory knowledge. This, then, must be our starting-point: to find an adequate definition of the State, from which all its determinations can be logically derived. Such a definition, in order to be truly adequate, must not include too much nor too little, since

it can become of great practical importance. For if men proceed upon a conception of the State that includes too much, then the State is directed to purposes which are wholly alien to its end, and which ultimately must be subversive of its existence. If, on the contrary, men proceed upon a conception of the State that includes too little, it does not answer the end of its creation, and like everything in the same category, must pass away. The political elements of the country have always swayed between these two extremes. The one party has sought to make the State perform quite all of the important and some even of the menial functions of civil society; the other party has maintained principles which would deny to the State the primordial right of all existence, namely, the right of self-preservation. It is hence of the first importance to determine precisely the thought of the State, since from this thought all its functions and limitations must be deduced.

But such a discussion will be necessarily somewhat abstruse. The thought of the State is of the most concrete and is proportionately difficult of comprehension. It is necessary to grasp not merely an abstraction, or some phase of the State's activity, but that activity in its totality, in its eternal process. There is no way of getting rid of the labor of thinking here, nor any means of making the subject entertaining. There never yet has been discovered and probably never will be discovered any means by which thought can be comprehended without thinking. But the fruits of such an effort will amply repay the severe labor of acquirement. In fact, it is worse than useless to proceed without this primal foundation.

First of all, then, a basis must be found for the State. Let us make our beginning with the simplest observation which is possible concerning it, namely, that it is a work standing in the world before us. It is not a physical product in the sense that a stone or tree is, but is created by Spirit or Mind as distinct from Nature. Those who maintain that Mind is only the higher part of Nature would also probably hold that the State is a product of this higher part, and thus substantially agree with the mentioned proposition. But observe that it is called a work, a product, and hence can only have been produced by Will, for this is the name of that form or phase of Spirit, which produces, or to use the technical word for this mental operation, which objectifies. A work is something real, the Will is that which makes real, *realizes*. Thus we have at least one of the essential elements and the great starting-point of the State: — Will.

But the Will in order to produce a work must have some end or purpose which it puts into that work; in other words, the Will must have a content. Hence, the next question which arises is, what is the content of the Will, which content when realized is that work called the State? Or, to shorten the expression, what does the Will will in order to bring forth the State? Or, to shorten the expression, what does the Will will in order to bring forth the State? This is the question upon which the whole argument turns, and when an adequate answer shall be given to it, there will be seen a formula expressive of the complete thought of the State. For it is manifest that the Will has many other contents, and produces many other works be-

sides the State, from which the latter must be carefully distinguished. Hence arises the necessity of examining and systematizing these contents.

Now the fundamental characteristic of the Will is to carry out and place in the world, *to realize* what has been conceived or felt by the mind. Its power consists in objectifying — to resort again to the technical expression — that which lies in the subject. It is what creates the world anew, so to speak, and stamps upon the same its own impress. But there is a vast difference between that which wills, and that which is willed; the latter we shall always be careful to call the content of the Will, and the former simply Will. Nor can it be superfluous again to remind the reader, that Will means activity and its product is always a reality; for Will unrealized is not truly Will, but a feeling, wish, conception or end; it lacks just the essential element. The consideration of the various forms of what is sometimes called subjective Will, can therefore be here omitted, for with us the Will is not at all, unless as object; it is, in fact, just the objectifying principle of mind. Again, too, we remark that the whole question of the State hinges upon an examination of the content of the Will.

The first difficulty which shows itself in our way is the great variety of this content; indeed it is quite as various as human activity itself. It is furnished entirely from two sources, Emotion and Intelligence.

To begin with the first of these forms, we shall call the Will which has Emotion for its content, the natural Will, since the emotions or feelings are directly connected with the physical organization. It is needless

to tell the reader how much of his activity depends upon this principle of his nature, nor is it in place here. But what does concern us is that some men seem to think that the content of the State is furnished by a feeling, as benevolence or happiness. But if we compare the reality of the State, that is, the State as it acts and must act, with any emotional content, we find that the latter is disregarded in every essential governmental function. Happiness and benevolence are not ends of the State, when it enters upon — and indeed must enter upon — a long, bloody, and uncertain war. Moreover, if the State is a benevolent institution, its prosperity, nay, its existence, must depend upon its stock of beggars; or, if happiness be the test, with the last unhappy man the State must die. Such a view would not seem to furnish a very positive or permanent basis of things.

But even if this reasoning be deemed unsatisfactory, there is still a fatal deficiency in every emotional content for the State. It leaves out of account the very thing which makes its own reality, namely, *Will*. According to this view the State is realized Will, with some emotion for its content; what then is to secure the Will which realizes this content? For the content can not possess any reality without Will, that is can not be at all in the world. Such a theory, therefore, dries up its source, cuts off its own head. A State which has happiness whether it be of one person, or of the majority, or of all, as its highest end, can not logically assert self-preservation, for thus it has an end higher than the highest. Hence the emotional nature of man can not furnish the content of the State.

But in the second division of the subject we have to examine the various contents or ends given to Will by Intelligence. These ends are in the first place finite, that is, not ultimate. For instance the thought of the reaping machine is conceived by the mind and executed by the Will; the man who makes it has it as the end given by his Intelligence. But it is only an instrument to bring about another end which is in the mind of the same or a different man, namely, the cutting of a crop of wheat. But the crop of wheat is not a final end, but a means for some other end which in its turn will again be a means. And so the series may be continued indefinitely. These contents we shall call the finite ends of Intelligence, since they are not absolute, and the Will which is occupied with them may be named finite Will. Their characteristic is to have an end external to themselves, to be really means for something else and not ends. The reader will observe how universal is this class of contents of the Will; they embrace quite the whole of the ordinary conscious activity of man. All mechanical employments, all commercial occupations, the struggles of ambition, nay, for the most part, the deeds of virtue are manifestations of the finite ends of Intelligence.

In fact, not a few theorists have held that this finitude is the only possible form of Intelligence. But the point of interest for our discussion is that many persons think that the State is merely an instrument for carrying out some finite end, which is external to itself, and many more persons take the same for granted without thinking at all. Thus the State is a machine for digging a canal, or building a railroad, a sort of gen-

eral scullion for all kinds of dirty or disagreeable work. So the reaping-machine is for securing the harvest, an end external to itself. Now I believe that the State can build a railroad or any other work; but mark the distinction, the State is not for the railroad, but the railroad for the State, it must be a direct means for accomplishing the end of the State.

If we now closely inspect this view, we shall find that it has the same defect which was before remarked concerning the emotions. Such a finite content for the Will always secures something else besides the Will itself, and thus disregards the very thing that constitutes its own reality, namely, Will. For it is the Will which executes all, which realizes all, even the pettiest end of intelligence, which is, indeed, the source of all power; confessedly the mightiest of all instruments, or rather, the instrument of all possible instruments, ought not some attention to be paid to its safety? Perhaps, however, it may be thought to be something unassailable and indestructible, and hence needing no protection.

But a little reflection will convince us of the contrary, indeed, will show us that Will is quite the only thing human to which wrong can be done. Recollect the distinction before made, that true Will is not subjective but is a realization. Now different Wills may have different ends, and hence contradictory to each other; the result is a conflict in which one Will in realizing itself destroys another Will which has been already realized. The logical result is the destruction of Will, namely, of Will as realization, for it has annihilated itself. What follows? All human endeavor,

all works of mankind, all rights are swept away in the twinkle of the thought. Hence the Will, the great instrument-maker, must now make a new instrument whose object is to secure itself, or to employ a more exact statement, the content of the Will which Intelligence now furnishes is the Will itself. The latter has no longer any external end alien and hostile to itself, but it seeks purely its own realization. With this new content, we have a third form of the Will which will be presently named.

If we were now to bring together all the various instruments of the world, and attempt to select the one which fits the above description, whose object is to secure the existence of Will, which one would it be? Let the reader exercise his ingenuity in finding it. First, he will have to exclude all those instruments whose end is beyond themselves, which are only a means for something else. Moreover, such an instrument can hardly be seen with the naked eye, not being a sensuous thing; a spiritual vision, therefore, is required in order to discern it. Still further, that form of mental discernment which can only comprehend a finite relation as means to an end, would be manifestly insufficient, if our preceding discussion was correct in its results. Nay, though I have used the word above, and must continue to use it in certain contingencies. it is not truly an instrument, for this generally signifies something used for a purpose extraneous to itself; whereas this cunning device is employed to create itself, is self-end, its object is itself. It is the Will which secures Will, hence secures itself. But if we look at that instrument which administers justice, makes and executes the laws

which are the real embodiment of justice, there will not be much difficulty in seeing that it has one grand object, to secure to man his Will, and moreover, that it too must be a Will in order to will his Will. Such an instrument as the one just described is easily recognized to be the State.

We have thus arrived at the formula upon which this and the succeeding discussions must rest, which is the germ of all political science: the State is the Will which wills Will. Such is the ultimate content which Intelligence has now furnished, a content which can be grasped only in one way, by thinking. It is true that this formula sounds like a jingle or play upon words, but thought does not go by the sound. Its meaning can be reached solely by thought and not by the senses or even the imagination. The Will has thus a content as broad as itself, and hence it has now for the first time a universal and therefore rational content. This form of the Will may accordingly be called the rational Will.

We have thus distinguished three contents, each of which gives name and character to a form of the Will. With that of emotion, it is the natural Will; with that of the finite ends of intelligence, it is the finite Will; with that of the Will itself, wherein the Will is its own content, it is the rational Will. This last is the basis of the two other forms, for it *secures* the realization of the Will, without which they can have no *secure* reality. Hence, too, they are capricious; it rests with the individual to take what content he pleases, but the content of the rational Will must be taken for man to be rational. Caprice, therefore, may

be defined as that form of Will which has any other content except that of the Will itself, it is simply not rational Will. This is not quite the usage of the word, but it will be understood.

A glance into the above analysis will reveal important results. The State is thus shown to be the logical consequence of the nature of Will; grant a man this activity and he cannot stop short of the State. It follows by the most rigid necessity. For the Will, with all its manifold content of desires, feelings, ends, must have, as its pre-supposition, its own existence, its own reality, for if it is not real, then it is no Will. Hence it must return to itself as its ultimate ground, the Will must will and realize itself, which realization we have already identified as the State. The fact to be noted, therefore, is that the act of every individual, however humble, his mere exercise of the Will involves the State, and were that act unfolded in all its logical results, there would be a complete deduction of the State. Were there only one rational being in existence, there would still be manifested, though not realized, in him the State. He could not be the complete realization of the Will, since there is thus no real antithesis between the individual and the State; the latter stands not forth in the world, but is still in the individual. Hence the beginning of man's activity is the beginning of the State, to enter it or not lies not in his choice, but it is the deepest necessity of his nature to exist in a government.

We are also now prepared to comprehend the relation of the individual to the State. Both are Wills, and in their true thought both have the same content. For the

individual must will the existence of Will; wherever or under whatever form it has been realized, from the property of his neighbor up to the government of his country, he respects it as sacred; such is the truly good man. The State, on its side, also wills the existence of Will, hence both have the same content, the same end. These two extremes are thus united, the contradiction between them is harmonized, and the great difficulty of all political and moral philosophers, the reconciliation of individual rights with governmental institutions at once vanishes. But the moment we take any other content for the Will than the one mentioned, the contradiction between the individual and authority appears as an insoluble problem. And so it is, for when we have a man pursuing his ends as absolute, and the State its ends as absolute, is there any mediation possible in case of a collision? The only reconciliation is that both will Will, hence have the same end; thus the individual can not nullify the law nor assail the State, for it would then destroy Will; nor can the State put down the Will of the individual, for the same reason.

Two questions probably arise in the mind of the reader at this point. First, suppose the individual assails the State by his acts of Will, is the State then to will his Will? Certainly. Secondly, suppose the State seeks the destruction of the individual Will, must the latter Will be the State's Will? Certainly. The first of these questions implies the negative relation of the individual to the State, and its true answer must exhibit the basis of the Right of Punishment. The second question implies the negative relation of

the State to the individual, and its true answer must exhibit the basis of the Right of Revolution. These are both pretty large themes, and we shall have to treat of them in different connection. It may be said, however, that a valid basis for them can only be deduced from the thought of the Will willing Will. These negative relations result from the fact that a person and a State are both individualities, possessed of distinct Wills which may agree or disagree, unite or collide.

The mediation of the individual with the State, the most important of all questions for the citizen, we thus see accomplished in the formula: the Will which wills Will. Now this principle, as before indicated, can only be given by thought. An intense feeling for country is not enough; patriotism is not knowledge, and hence is likely to destroy the very object which it is seeking, nor can it always tell when it is destroying the same. The individual citizen must, therefore, think, but above all is this necessary in a free State, the most complete realization of Will. As a voter he is called upon to decide the policy of his country; that policy, if it be hostile to the thought of the State, can only end in its subversion. But, particularly, the individual must not be seduced into placing his own subjective ends in conflict with the great end of government, whether those ends be of ambition or gain, or bear the more sanctified title of conscience, or law of God. On the other hand, the State has the same content and hence it, too, must think, it has a known end which it must realize. It knows and wills as any individual, only not capriciously, for its content is

always itself, hence is necessary. This distinction is of capital significance; the State is the absolutely rational individual, whose Will is always universal, a law, whose duty it is to subordinate caprice and unreason. The true State, therefore, must think, that is, must know its own thought; based upon anything short of this, it can only possess a transitory existence.

A practical application of these principles lies not far off. The Government of the United States always reposed more upon instinct and feeling than upon conscious thought. The result is that it is beginning to turn against itself, and to destroy the very object for which it exists. The time has come when the people must comprehend the thought of their State, if they wish to remain sovereigns of a free country. The idea of a ruler who is ignorant of the form of government which he is administering is not favorable to its perpetuity. All the dangers of the present proceed not from any external power, but from within, from the violation of the fundamental national thought which has become obscured in the minds of the people. Heretofore we held it implicitly, until we now find it slipping from our grasp. The great awakening and the new dawn will be when that grand national thought, purified of its former darkness, shall rise into the clear consciousness of the American citizen. Such a result, however, can only be accomplished by thought.

Hence, it is the most practical of all questions, notwithstanding its theoretical aspect, to re-examine and re-state the foundation of government. It is by no means an idle problem of metaphysics, which can be dismissed to the secluded study of the philosopher.

Nor can it be any longer the exclusive property of the few, but it must be brought home to the many, who are now the rulers. It must be burnt, as it were, into the consciousness of the people, so that it forms the ultimate ground of all their activity. But I hear some one say, "Government is a practical science." The pre-supposition here is, that theory and practice are irreconcilable contradictions. How often does this false and wretched assumption paralyze the thoughts of men! Is not practice rational? If it be, must not reason be able to enunciate its own principles? Rational theory only tells what rational practice does; the substance of both is the same.

Our country hitherto was the most complete manifestation of Will willing Will that history has produced; in other words, the most perfect State, and I think that it is possible to improve much upon what it was. One thing is certain, we can never go back to that first condition of our national existence, no more than we can go back before the Declaration of Independence, no more than mankind can return to Paradise. But the country is now passing through the fires of self-contradiction; it is denying, on many sides, its own thoughts, its own reason, which means, in the end, the denial of its existence. The anxious question is, will it withstand the terrible ordeal, or die under the surgeon's knife?

NO. 3. THE CONSTITUTIONAL STATE. — In the preceding article the object was to evolve the fundamental principle of the State from the nature of the Will. We beheld the individual rise into the proportions of the State by the necessity of his own activity. The Will with its

multiplicity of objects comes to grasp itself, to realize itself as its own content. This realization is the State, which was therefore defined in a general way to be the Will which wills Will. Such is the formula which must be the germ of all the deductions which are to follow, and it will be continually recalled and repeated. But here two warnings may properly be given to the reader in order to avoid any misunderstanding of the argument. In the first place it must not be imagined by the above language that the State makes its appearance in time after man has examined and discovered the inadequacy of the various contents of Will. On the contrary it was shown that every act of Will, logically considered, pre-supposes the State as its own true realization. Hence some form of government is found in every condition of human existence. It may be rude, simple and inadequate, nevertheless it *is*. Will, as the great realizer of all things, must itself also be real; otherwise it flies from, it denies its own fundamental principle. Therefore, a Will without a State is a contradiction in terms and simply annihilates itself. But the second warning must be mentioned. Some persons may still be troubled with the reflection that a reaping machine for example is also a realization of the Will and hence does not differ in definition from the State. But always notice the content which furnishes the basis of these distinctions. The Will in making a reaping machine has a content different from itself; the State is the Will which has itself as content. This definition carefully kept in mind will, I think, furnish the key to every difficulty.

Such is the first great movement of our principle:

the rise of the individual to the State. But it must not be viewed in the light of a dead abstraction. On the contrary it is eternally active, and must eternally be active while the State is a living organism. The individual is only in this way resumed into the higher principle of his rationality, and therefore the process of ascent into State must be continued as long as there are individuals. For the State, like the human body, is always reproduced in order to have life. It is thus that we arrive at the insight that the State must have a means for resuming the individual Will into itself, and that such resumption cannot happen once for all, but must be continually taking place. Now what governmental function is occupied with this duty? Evidently the Legislative, for it is the instrumentality by which the consciousness of the people is collected and expressed in a permanent form in laws and institutions. For these must spring from and rest upon the spirit of man; without such a basis they stand in the clouds. It is the law-making process whereby man transmutes his thought, his consciousness into a real and universal form. Thus the State is created, and hence its primal function is some method of legislation, which also remains a necessary and permanent element of it in every stage of its existence.

But now let us consider the reverse process. If the individual must beget the State, so on the contrary the State returns and secures the individual. This is involved in the formula which has already been deduced: the Will which wills Will. The State is therefore the absolutely rational individual which has no caprice, since it must always have Will as its content. It can

not, therefore, if it be true to its end, run off to a thousand other things and select what object it pleases, like the ordinary man. It is limited to the realization of Will, yet within this sphere its authority is absolute. Wherever there is an exercise of the Will, it is sacred, and must be protected. Let it be good or bad, the individual must have his Will secured to himself. It is his holiest right, indeed, the basis of every right; it is, moreover, a right which he has found a special instrument to maintain — the State. If he commits a crime, it is nevertheless his Will which must be secured to him. The State thus brings home to every man the value of his deed. If it be wicked, which means if it destroy in some form the existence of Will, then his Will must logically perish, for it has sought the destruction of Will, that is, the destruction of itself, which destruction, since it is Will, must be secured to him. But if the deed be good, that is, if it will the existence of Will, then it must be protected, for the State itself is just such a Will. Here is seen the element of justice which is one of the chief functions of the State to administer. It secures Will, by it every man receives what his deed is worth. We thus see that the second movement of our thought has a real, active existence in government.

The next step is to comprehend the third and final stage of this process. It has just been seen that the State is an instrument for giving validity to every man's act, in other words, for administering justice to the world. It has furthermore been shown and is declared in our formula that this instrument is also a Will, and hence a Will which has itself as content.

Thus it is an instrument to secure the entire realm of Will, not merely that of individuals, but since this very instrument is itself Will, it must above all things secure itself. That is (to give the same thought another turn) the State is to secure Will, and hence it must before everything else secure the instrument of the same, which is itself. Here is seen the basis for the ultimate maxim of all nationality: the safety of the State is the supreme law. This principle is not therefore a mere assumption of power, for it is vindicated by the most rigid logic. The State would otherwise be the most terrific contradiction, for though it exists to secure all Will, yet it would then neglect Will in its highest manifestation, namely, the State. It is thus plain that the formula, the State, is the Will which secures Will, at once includes and reconciles its two quite opposite functions, that of securing the individual Will on the one hand, and of securing itself on the other. Nor can there be any doubt which of these two principles is the higher, and therefore the one to which validity must be given in the case of a collision between them, a thing which unfortunately sometimes happens. The individual's right of existence is subordinate to the State's right of existence.

Let us now examine this last result and designate its character somewhat more precisely. The law of self-preservation was declared to be the ultimate law of the State. It is bound to defend its own existence against everything else. Here arises upon our view a new principle which may be called the individuality of the State. The world now divides up into a number

of individual States, for such is the general principle. Each is a limit to all the rest, excludes all the rest, asserts itself against all the rest. Note that a State can be the only limit for a State, since it subordinates everything else to its own individuality except just this principle of individuality, which is also in the neighboring State. This is a most important principle, for upon it rests the vindication of the independence and unity of every nation. Our last result is therefore the individual State asserting itself and excluding others, united and independent. Here is also a function, the function of the unity and individuality of the State, which can hence be truly represented by only one individual, the Monarch or President.

Three different elements have in this manner shown themselves in the process of the State, any one of which being absent would destroy the whole. First is the resumption of the individual into the State; secondly, the return of the State to the protection of the individual; thirdly, the assertion of the State through itself constituting its own individuality. These principles have moreover proved themselves to be not merely the abstract deductions of thought or the idle figments of fancy, but to possess reality in the highest degree, to be in fact, just the essence of the State. They can be pointed out in all governments, they constitute the fundamental divisions of political science.

One step further. This threefold process of the State, this tri-partite organization of government, which has thus been deduced from the nature of the Will, and which when realized forms the three great political functions, what shall it be called? Its name

is the Constitution. Thus we have developed the general thought of the State into the more specific thought of the Constitution, and the total result at which we have arrived may be denominated the Constitutional State, an excellent landing place in our undertaking. Here we shall for the present stop in the course of our deduction and go back to pick up some important threads hitherto necessarily neglected.

A complete comprehension of the above statements will enable every one to see through the mist which theory has thrown around this whole subject. The grand axiom of American and English political literature, is, that government is instituted for the protection of person and property, that is, to secure the individual Will. Undoubtedly, this is one of its functions, as has before been indicated, but it is not all. Thus a State could not logically defend itself, and how widespread was such an opinion at the beginning of the late war? I know the answer which is ready: "The State in protecting itself is simply protecting person and property." But it destroys person and property, it sacrifices thousands of lives and spends millions of money. If this be protection, then destruction is protection, and thought is forever giving the lie to itself. The true solution of the difficulty is to broaden the view of the State and to take it in its whole compass as the Will which wills Will.

It is also sometimes supposed that the condition of the highest freedom is the state of Nature. But Will is there least of all willed by man; on the contrary it is trampled upon by the strongest. It is true that if freedom be caprice, this is the great world of freedom;

but if it be the willing of Will, then this is the condition of absolute unfreedom. The declaration is often made, too, that man parts with some of his freedom when he enters the State. The truth is he then gets it for the first time, for previously it had no realization in the world. The notion has also been very prevalent that the State is a contract between its individual members. But the very condition of the contract is the State, since it is the latter which gives validity to the individual Will upon which contract is based. Such a theory besides many special objections, has the one general objection: it implies the existence of the very thing which it is trying to account for.

The State which absolutely fulfills the above-mentioned test is the perfect State, and in so far as it falls short of the same, it is to this extent imperfect. That no State at present in existence comes up to this standard need hardly be said, nor any State that ever has been in existence. But we are now in the possession of a criterion by which to judge of the State; it must be the complete realization and security of Will. Every essential stage of consciousness in the history of the world must have its State, for this is its true reality. Hence the governments which have existed may be regarded as so many approaches to the complete thought of Will. They have all fallen short, perfection has not yet been attained, but there has been an unceasing movement towards making the State correspond to its idea without flaw or blemish.

It may be said here that even the despotism if it be permanent, must rest upon the national Will. This cannot be denied. But in such a case the Will is con-

tradictory of itself, it wills to have no Will of its own, to destroy itself, and realizes this Will in a State. Now the difficulty is that such is just the consciousness of the people, from which spring all institutions. The progress of government has been to get rid of this contradiction, to secure Will, not to destroy the same, or to base itself on a Will which wills its own destruction. The movement has been a slow one, and its various phases give the different gradations of States, ancient and modern.

Here is the proper place for considering that much-abused word, freedom, and its different meanings. They are all derived from the various contents of the Will. Just as there is a capricious Will, so there is a capricious freedom which springs from some emotion or some finite end of Intelligence. This kind of freedom is legitimate and necessary within its province, but the citizen of a State must be able to rise above it. For there is also a rational freedom which originates in the rational Will, which always regards the freedom of others, in general it is an individual Will whose content is Will in all its manifestations. Such a content is therefore given to it, on the one hand by itself and on the other hand by the real world ; it is therefore necessary. The State and institutions already exist which the individual must will. There is no choice, caprice is cut off, man must be rational unless he chooses the opposite, namely, to be irrational ; there is only one option remaining inside of reason.

Such is the highest thought of freedom, a thought which takes in the whole field of Will. It should be the underlying principle of action for every citizen of

the Republic. He ought to rise above the narrow aims of the individual into an universal life ; what rights he demands for himself, he should concede to all. Wherever he finds Will, especially in its highest realized forms in the Constitution and laws of the country and of each particular State, he should respect it with a religious awe. Let him once begin to tear down these sacred institutions with violence, and though the locality may not be his own neighborhood, soon it will be found that every blow at a distant part is only a thrust at his own vitals. He is thus logically destroying Will, a destruction which must ultimately sweep back and include his own State, his own community, himself. For he is uprooting in his own mind the very consciousness upon which the institutions of his country repose. He is hence not only preparing himself for the loss of liberty, but he is nursing to life the usurper by arming his rulers with such unwarrantable powers. The citizen of the United States must be truly universal in his thought and sympathy, he must know and feel the wrong done to a distant State with the same intensity as if an outrage had been perpetrated at his own door. It will be a degenerate age when an American can look with indifference on any species of injustice and oppression ; but woe be to him when heated by the passions of war or inflamed by the zeal of party, he not only applauds but demands the destruction of the fundamental principles of his government.

NO. 4. THE CONSTITUTIONAL CONFEDERACY. — In our last essay there was attempted a logical deduction of the three functions of government which are com-

monly called the Legislative, the Judicial and the Executive. We saw them springing by the most rigid necessity from the thought of the State. There was no argumentation from utility or from experience, both of which, however, would confirm all that was said; but these functions were evolved directly from the fundamental conception of government. They are only instrumentalities for realizing the great end of the State, which end is to secure Will. The sum total or body of these instrumentalities in their detailed development has also a specific appellation: the Constitution, which expresses the organization of the State.

The Constitution may therefore be declared to be the realized definition of those instrumentalities which secure Will. I say definition *realized*, for I do not mean merely a definition in words. A constitution must be something real, existing in the world, with certain definite limitations. Such is a real definition of an object; the main question concerning it is, what has it defined itself to be? In this sense a constitution or form of government may be said to be a nation's definition of freedom. For it is that which the nation has realized and put into activity; it is a real definition. This may, or may not, coincide with the speculative theories of some individual members of that nation; if it does not, their definition is unreal, abstract, and is not national. Hence all constitutions may be taken as so many definitions of freedom, given by the different peoples of the world, all of which have one common object, the security of Will.

Moreover this definition may or may not be written

out in a specific form. The mere fact of writing, or even expression, does not affect the reality of the definition, it exists all the same, there it is, and everybody can see it at work. But the written constitution is the more complete definition. For the nation has thus become self-conscious ; it can scan its own operations more perfectly ; it possesses an absolute criterion of its own conduct. As conscious activity is higher and more rational than instinctive activity, so a written constitution, provided it springs from the national consciousness, is superior to an unwritten one. Indeed there is a nation which seems, if the arguments of its publicists mean anything, to be just in the contradiction : to have an unwritten constitution which is written.

But here a confusion must be avoided. Constitutions may be written by individuals or by nations. In the former case the nation takes the first good opportunity to tear it to pieces, for the simple reason that the document is not its own. France has had several of these written constitutions of individuals, but none yet of the nation. Many men have in their benevolence undertaken to make constitutions under which the people ought to be happy ; but alas, benevolence will not make a constitution. The individual who wishes to write a constitution must content himself with being an humble scribe, noting down only what the spirit of the nation whispers in his ear. Yet what a mighty scribe would that be, mightiest among men, for he can distinguish the universal reason from his own subjective notions, or rather his thought is one with that reason.

The nation thus defines itself in the constitution. This definition will be complete in proportion as it rests upon the absolute comprehension of the State. Thus a people whose thought of the State, or I might say, whose thought in general is inadequate, one-sided and intolerant must exhibit the same features in their constitution. For they can only realize what is in them and not what they have not. It is this general condition of a nation's intelligence which is often called the national consciousness. Upon it repose the validity and success of all institutions. These same institutions being transplanted to a different country, soon wither and die. What is the reason? Because they have no root in the consciousness of the people; they were the offspring of another national spirit. Nearly every country of Europe has sought within the last century to naturalize the English constitution, but without success.

It will perhaps assist the comprehension of this subject by adding that a nation defines itself in other ways besides through its constitution. It can, indeed must give expression to its fundamental thought in its literature, its religion, its philosophy. They have one common foundation, the national consciousness; that is, if they be truly national. How completely oriental absolutism, oriental religion, oriental art, spring from one common thought! Though these forms are distinct, the essence, the spirit is the same; it is the same definition, though the language be different. One of these definitions, therefore, is the State, or more precisely the constitution. Moreover it defines that thought in a special direction, namely the thought of freedom. Or

to use the phraseology already employed, it is the nation's definition of the instrumentalities for securing Will. The constitution is, therefore, the Will-definition of nation; its religious, artistic, and philosophic definitions belong not to the present subject and will be dismissed. The point which we now wish to emphasize is, that it is the Constitution which makes any given State what it is; in other words, constitutes its individuality.

We have thus followed the rise of the individual person into the individual State. The latter has also organized itself with its various functions in the constitution, which, whether written or unwritten, must express the innermost spirit of a people, and must distinguish its government from that of all other peoples. Thus there arises a new organism; a new individual against other individuals; that is, the State with its boundaries and peculiarities against other States. As every State is itself and no other, having its own consciousness, so the expressions of this consciousness in the constitution must be peculiar to itself. Such is what shall hereafter be called the individuality of the State. We shall now take up this new principle and unfold it in its logical consequences.

It has already been attempted to prove that the State is a Will; it is now shown that such a Will is the individual Will of a State. The latter thus stands in relation to other States which also have their individual Wills. Just as we saw persons with a variety of Wills, so we now see States with a variety of Wills. Moreover the same collision arises, a collision inherent in individuality. Each individual State asserts itself, at-

tempts to make its principle universal. Thus it assails other States and subsumes them. Now the essential insight here is the fact, that in so doing it is simply destroying its own individuality, for were it to become universal, it would be no longer individual, there would be no other States from which it could be distinguished; they would be all swallowed up, that is individuality would be swallowed up. Hence such a State is destroying all the time what it is attempting to maintain. This is the contradiction which war involves, the conquering State logically commits suicide. For by conquest it has destroyed an individual State, and thereby it saps its own fundamental principle of existence which must be the existence of the individual State. Its own conduct carried to its results must end in its own destruction.

This negative relation of individual States to one another is known in the history of the world as war. In fact history hitherto has recounted but little more than these struggles, in which one State is trying to absorb another, and the latter is resisting with little or great determination. The sympathy of mankind is always in favor of individuality, in favor of national independence, against the State which seeks to destroy the same. For the instinct of all peoples has told them that this was the great boon, and reason has vindicated the same view. Hence a nation which is based upon conquest must pass away. Thus all the great empires of the ancient world perished, for they were contradictions in themselves, and such empires must perish, for they bear in themselves the seeds of their own destruction. War of conquest thus has this con-

tradiction: what it seeks to establish, it destroys; the paean of victory, were it truly heard, is the knell of destruction. The lessons of history upon this point are so recent and so startling, that no examples are necessary.

When this negative relation merely ceases, we have peace. When the States begin to recognize the individual existence of each other, then we have the period of treaties, pertaining chiefly to commercial intercourse. Then follows the alliance which is the union of several States into one individuality for a certain time and with some definite purpose, as to preserve the balance of power or to make war in common upon some nation. A more complete historical evolution of these stages will hereafter be given; at present it will suffice to observe that there is seen in them a regular approach to the recognition of nationality.

We thus see that the individuality of the State by itself, in its one-sided assertion, can only bring forth its destruction; it annihilates what it would preserve. With the destruction of the State follows the destruction of Will, of freedom, for therein its instrumentality is destroyed. The individual State with its constitution shows on this side its inadequacy to secure Will. It breaks down, manifests in war its finite side. This is true of the conquering State, and much more is it true of the conquered State. That great instrumentality for securing Will is thus insufficient for its end, and man must seek out some additional instrumentality, before he can be said to have completely secured Will. What then is it? Fortunately it is at hand, it has already been implied in the foregoing remarks.

We are now ready to make the transition from the Constitutional State to the Constitutional Confederacy.

In order that a State may secure its own existence, it must not destroy other States, for thus it wills the destruction of the individual State, and hence itself. But what can it do? Only one thing: recognize the existence of the individual State as its absolute principle. Thus only can it be consistent with itself, free itself from the contradiction of war and be preserved. For it now recognizes that its right is the right of every State, hence it can no more raise its hand against its neighbor than against itself, and moreover it also recognizes that the right of its neighbor is its right, and will not for a moment allow the same to be assailed. Right now has reached its truest, highest characteristic, namely to be universal. Thus we have among nations the great principle of the recognition of national individuality or nationality.

But this is not enough. Were it to stop here the best fruits of this principle would be in danger of being lost. The next step is, the recognition of nationality must be *realized*, must be given an existence in the world, for merely as recognition, it remains without power, it is a sort of national caprice, since it rests with the individual State to follow it or not. Just as we derived the State as the realization of the individual Will, so now we must have a realization of the Will of the individual State. The logical process is the same. The individual wills Will and brings forth the State; but the latter too has developed an individual, finite side, and fails to secure Will, through danger of being destroyed from without. Next follows the

final step, the last and greatest stadium of history, namely, the State must will the existence of the individual State as universal principle, must realize this principle in a new form of government, and must define that form of government in a new constitution. Thus the recognition above mentioned becomes a reality, is embodied in an instrument which can enforce its end, and no longer is a matter merely of the individual State. As we had above the Constitutional State, so now we have the Confederacy of States with a constitution also, whose sole object, whose entire content can only be the conservation of the individual State. All its instrumentalities, all its provisions, all its interpretations must spring from this one thought and be justified by it, else they are wholly unjustifiable. Such a form of government of which only one has hitherto appeared in any degree of perfection may be called the Constitutional Confederacy as distinguished from the Constitutional State.

It will be observed that to bring forth such a government, there are two grand pre-suppositions. The first one is, that the national consciousness must have risen to the point of recognition as above developed, the nation must be permeated with the idea of universal justice, which freely allows to all, both individuals and States, the same right that it demands for itself and its State. This national consciousness will become a reality in the above form of government, will define itself necessarily in the same; on the other hand, such a government can only exist by having this national consciousness as its foundation. If that be once lost, then the entire superstructure must tumble to ruin.

The second pre-supposition is that there must be a number of States which reach this stage of consciousness about the same time, for each one must recognize the national individuality of the others. If there be but one individual person there can be no real State; in like manner if there be but one State, there can be no real Confederacy, though the logical basis of it be present.

On a review of the preceding topics it will be noticed that three distinctions have been made which, if correct, sweep the entire field of political science: —

I. The individual State organized in its constitution which may be called the Constitutional State.

II. The external relation of these individual States to one another in its manifold forms of war, peace, treaty, alliance and finally of international law; the growth of recognition.

III. The absolute union and at the same time preservation of individual States in the Constitutional Confederacy.

It has been stated above that there is but one nation which has realized this last form of government to any degree of perfection — the United States. It shall be our pleasant duty hereafter to recount the origin, growth, and struggles of this principle in the history of the world, and its final triumph in the Federal Constitution. At present there is only room for one practical application. In the Constitutional Confederacy there are two principles, seemingly of the most contradictory nature, combined into perfect harmony, that of union on the one hand and that of the individuality of the State on the other. Now if either of these

principles be asserted in their abstraction, in their one-sidedness and not in their concrete unity, there arises a doctrine which, if carried out, can only end in the subversion of this form of government. If the individuality of the State be insisted upon in its one-sidedness, then we fall back into the second stage above given, the stage of struggling fighting nationalities. Moreover this doctrine simply destroys that which it sought to accomplish; in its solicitude to preserve the individual State, it has laid it open on all sides, from within and from without, to destruction. For if our previous reasoning has been correct, we have shown that the ultimate safety of the individual State can only be found in the Constitutional Confederacy. Historically, this doctrine was that of the Calhoun school politicians, a doctrine which resulted very naturally in secession and disunion, that is in the total subversion of the Constitutional Confederacy. But there is at present no danger from this source, for it has been put down by arms, a necessary but most unfortunate occurrence, for war as above shown is a contradiction, it annihilates that which it is trying to preserve; but most contradictory in a Constitutional Confederacy whose very object is to prevent war, the collisions of individual States. Through our civil conflict, therefore, the tendency now is toward union in its one-sidedness, toward centralization which destroys instead of preserving the individual State. In such case, likewise, the Constitutional Confederacy falls back into the empire with subject provinces instead of individual States. There is unity, but it is the unity of absolutism, of Orientalism, in whose

capacious maw all free spontaneous life, all individuality is swallowed up. But the true, concrete union, the Constitutional Confederacy exists simply in order to secure the individual existence of the State; that is its whole content, that is the element which all States have in common, and hence is the point in which they all can be united. Such is the rational insight to be attained by every American into the nature of his government. Thus there can be no disunion, for that can only lead to the annihilation of the individual State; nor can there be any centralization, for that means the absorption of the individual State. As long as the American citizen remains true to this consciousness, the plague of the past can not return, and the plague of the present must vanish. But if he allows one State or one section of States, either to cut loose from the rest, or to absorb the rest, be it openly through violence or covertly through legal forms, the result is the same, the destruction of the Constitutional Confederacy.

No. 5. THE WORLD-HISTORICAL DEVELOPMENT. — Our attempt hitherto has been to give the logical basis of the State and the Constitutional Confederacy and to deduce them from the nature of human Will. We there adhere to the deduction of thought, to the logical evolution of these forms, without saying anything of the historical development. But this too must be considered, for it presents emphatically the side of reality which cannot contradict, but must confirm thought, History itself is only a manifestation of Reason, and hence Reason cannot be in contradiction with history. It becomes necessary therefore to consult the records

of nations, and see if we can discover the growth of the principle which was declared to be the foundation of the Constitutional Confederacy as well as of the Constitutional State.

This principle was shown to be the recognition of the right of the individual State. This consciousness, namely, that every people recognizes the existence of every other people as one with its own existence is that which calls forth and supports such a form of government. But such a consciousness is the ripest product of the world's culture, it is the growth of centuries of strife and collision, it broadens the citizen from being merely national into being truly cosmopolitan, that is, his life becomes universal, the true destiny of man. But a mistake must here be avoided. Notice that this cosmopolitanism is of a peculiar kind, it is reached only through the State, in fact its very object, its whole content is the conservation and exaltation of the individual State. It must therefore be carefully distinguished from that sentimental cosmopolitanism which professes to be above all mere State lines, and to disregard all national distinctions as too narrow for its comprehensive soul. Such a spirit is hence negative to the State, and is even ready to see it destroyed, instead of cherishing and perfecting it as the most adequate and indeed the only means for the realization of the highest ends of humanity. For the State is the sole instrument of securing freedom to man, and the Constitutional Confederacy still further secures and completes that instrument. In fact this abstract cosmopolitanism is a contradiction in terms, its votaries would have to form a people without being a people, would have to be a nation without nationality.

We shall, therefore, now address ourselves to the work of this part of our subject which is to exhibit the historical evolution of the principle of recognition and its coincidence with the logical evolution of thought. The Oriental States are simply based on the destruction of individuality through its entire sphere. But since this destruction is accomplished through the individual, we must have the one exception to the universal rule, the despot, who tramples upon instead of recognizing all other individuals. Hence, there is in the East no such thing as Right in reality, that is the real security of Will through law and institutions. A despot may be kind and dispense justice, but he may not; it depends wholly upon his caprice, there is no *realized* system of justice. It may be said that all this is in accordance with the wants and consciousness of the people, that the Oriental State is the realization of the Will of the nation. Unquestionably these statements are true; this is just the oriental consciousness, to be a contradiction; for their Will is to destroy Will, and they realize their principle in their government. Hence Right is so uncertain, for it is eternally in strife with itself; its own realization is its own destruction. Such is the case as regards the individual person, the same is true of the individual State. For each State of Orient cannot tolerate another State alongside of it, it must attempt to subsume all its neighbors. Hence the history of the East is a succession of empires, its heroes a succession of conquerors. All are seemingly impelled by one thought, that the existence of another nation besides themselves must be their annihilation. Their natural condition is hence war, which, as was

attempted to be shown, means the destruction not only of the conquered, but also of the conquerors. It is manifest therefore that the Oriental world proceeds upon the principle of the destruction of the individual State instead of its recognition. Hence it is too that all Oriental States have passed away. Such is the general consciousness of the East, though I am aware, a few exceptional instances may be found by the historical student.

If the Oriental State rests upon the negation of the individual, Greece asserts directly the opposite. The fundamental principle of the political consciousness of the Greeks was what they called *autonomy*, the right of every State, nay, of every community and every village, to be governed by its own laws and to obey its own magistrates. Hence the political tendency of Greece was to split up into an indefinite number of petty independent communities. Here we see individuality in its one-sidedness and self-destruction. For these individual States do not recognize one another, their chief object is to assert their own individual existence, hence the old conflict arises between the various struggling States. In such a struggle there can only be one result, one individual absorbs the rest, and thus the complete assertion of individuality in its abstraction lands in its opposite, Orientalism, the annihilation of the individual. Hence the logical as well as the historical end of the Greek world was Alexander and his Oriental despotism to which Greece was finally annexed. But it took several centuries to effect this result, which was the political death of the nation. There were various phases of the transition,

wherein the Greek always sought to be true to individuality. The smaller States to prevent themselves from absorption, acknowledged a leader and protector. Thus arose the notion of headship or as they called it hegemony. But this union was not based upon recognition except to a small degree, hence these leaders always had the tendency to destroy the individuality of the States under them. The Confederacy of Athens soon became the empire of Athens, from the leader she became the tyrant. Sparta under the banner of autonomy leagued the Greek States against the hegemony of Athens and destroyed it. Sparta was now leader, and in her turn commits the same acts which had overturned the headship of Athens. Thus it was shown that the Greek world could not solve this contradiction, and perished beneath its strife. The history of Greece exhibits little else but this collision between autonomy and hegemony, the two fundamental categories of its political consciousness. Alexander steps in, but he is a return to Orientalism. Still this is only apparent, not true, the world cannot go backwards, hence Alexander's empire disappears almost with him, and a new principle in the history of mankind, the Roman, now arises and takes up into its bosom the Hellenic nation. The undying merit of Greece is that she insisted on individuality, hence with her freedom is born into the world.

Rome too was a conqueror and hence in its birth it had the germ of its destruction. But it was different from the Eastern empires, for it sought to *assimilate* and not to annihilate the individual State. The Orien-

tal cared not for his conquered people or lands, only they should not be. But Rome sought to make all countries Roman, assimilation was its principle. It thus tried to universalize itself, not individuality as such, but itself, Rome. Herein it also differs from the Grecian States which sought their own independence merely, their own autonomy, not for all like Rome, but for themselves. Provided *they* were free, why should the fate of their neighbors concern them? These neighbors were perhaps barbarians or Greek enemies. It is true that this assimilation of Rome destroyed the individual State, yet it tried also to preserve it, in a manner, by making that State one with itself. Such was the grand and mighty principle of Rome, it sought to make the world like itself, to make itself universal. But such a consciousness was also a contradiction, for Rome to be like all the world, must renounce its own individuality, must be no longer Rome. And this is just the process which took place, Rome is assimilated quite as much as she assimilates, all nations produce their influence upon her as well as she upon them. Not alone captive Greece captured her conqueror, as the Roman poet says, but all other conquered States assisted. The result was, Rome was changed, was no longer Rome, lost her individuality. Hence after a time she could no longer make conquests, her Roman strength was gone; thus ends the Roman Republic. The Roman world then attempted to hold itself together, to maintain its unity, which had been based upon the destruction of the individual State. Thus the empire arises when it has connected with itself the East, yet it is not the Oriental.

empire, but it rests upon Law, the existence and security of Will, which it was the special function of the Roman mind to establish for future ages. But still the emperor is above Law, hence Law is not yet universal, the Will is not yet secure. Thus the Roman Empire had the same contradiction which we find in Roman Law, it secured absolute caprice to the ruler, and at the same time absolute right to the subject.

The ancient world had therefore in common the one principle, the destruction of individuality, yet in various gradations. Its whole effort was to remove the contradiction inherent in Orientalism which we found to be, the Will realizing a form of government for its own destruction. The Greeks laid their whole stress upon the individual will, hence with them Freedom enters the world, still not the full-grown man Freedom, but the infant Freedom. Hence the eternal interest which mankind has always had and must forever have in these first faint lisplings, these infantile babblings of Freedom. But the Greek did not recognize the individual rights of his neighbor, he only asserted his own, and was indifferent to or assailed his neighbor's. The Roman too asserts his own individuality like the Greek, but he seeks to make it universal like the Oriental. The Roman therefore to a certain extent united in himself the Greek and the Oriental. But none of them have come to the point of recognizing individual nationality, but all are based on its destruction.

I am well aware that the historical student may point out many exceptions in the ancient world to the above-mentioned principles. But the general consciousness,

the net result of ancient spirit is only intended to be expressed. To follow out the causes and results of all these exceptional cases belongs to the special history of antiquity. What is now wanted is to comprehend the essence of those times in a few sentences. For that was also a world of conflict and contradiction; and necessarily must exhibit exceptions, instances hostile to its general spirit. Otherwise there could have been no war, no struggle.

One of these exceptions I feel like mentioning, for it is so remarkable and so different from any civil organization of its time that it almost seems a prophecy of the modern world, or perhaps of the United States, I mean the Achæan League. Here we behold a confederation of independent States with individual autonomy and at the same time subordination to the Confederacy. The great and striking characteristic and that which distinguishes it from every other political form of ancient Greece is that there was no hegemony, no State had the headship, it was the whole Confederacy which led. But it did not succeed, for such was not the true outcome of Grecian spirit. It seems the contrast to Orientalism into which Greece relapsed in the empire of Alexander, for this was its logical result. Yet as if to show the promised land, as if to give a momentary glimpse of the far-distant Future when not the individuality of Greece, but the true individuality based on recognition would appear among men, the Archæan League sprang into a short-lived existence, a beautiful yet solitary flower growing out of the decaying trunk of the fallen oak. It therefore rather indicates the death of Grecian spirit, being so entirely

different. If it could have won, if it could have beaten back the East on the one hand and Rome on the other, mankind would, one seems compelled to think, have skipped two thousand years of its history and leaped at once into our own epoch. But the very fact of speedy dissolution shows that the Constitutional Confederacy could not belong to the ancient world.

But to resume. The ancient world brought no peace because it did not bring the recognition of the individual. The Roman Empire as was above stated, could conquer no more, for it had not the old Roman spirit of the Republic. Hence the extra-Roman world began to collide with it and finally destroyed it, chiefly through barbarians of the North. They broke the vast empire into fragments, each formed a nation of its own. Thus nationality was again restored after it had been quite destroyed by the assimilating process of Rome. This restoration of national individuality is the work of the Middle Ages. They may be compared to Greece in some respects, for both have the principle of individuality in its one-sidedness, hence exhibit all the hatefulness and strife of selfish grasping individuals. But the Middle Ages have behind them the Roman World with its laws and the Gospel with its humanity.

The Middle Ages therefore left Europe divided up into many different nations, each one having its own peculiar laws, customs, institutions and language. Now begins in more distinct outlines the struggle of individual nationality against absorption. In the sixteenth century Charles V. roused Europe against him upon this issue. He seemed to aim at universal

dominion, at swallowing up the smaller States into one grand empire. But the age of Rome was gone. These smaller States formed the *League*, which from this time forward becomes the most enduring and most powerful instrumentality of European History. Now the League, as will be apparent on a slight analysis, is based on the recognition of nationality. For its members are resolved to protect one another, to secure the individual existence of each constituent State. It is true that many princes may have had far different motives in joining such a league; but he is a mere tyro in history who thinks that its great epochs and revolutions, its grand results are determined by the subjective motives of a ruler or minister. It is also true that the leagued nations had a faint perception of their principle, and often fell out with one another, and lost for a while their basis of conduct. But neither Charles V. nor Philip II. were able to effect the subjugation of Europe; the League, weak and incomplete as it was, thwarted all their plans, and the sixteenth century witnessed the secure establishment of what is called the Balance of Power, the purport of which is that the limits of every State, however small, are sacred, and must be guaranteed by all the other States of a political system. Still Europe has by no means secured the full fruition of this principle in all its results. The struggle is not yet ended, cannot yet end, for it is based upon two hostile phases of consciousness, both of which are seeking to realize themselves. The Latin consciousness has received the inheritance of Rome, it speaks a modified Roman language, it judges by Roman law,

and it still shares the Roman political thought, which seeks a unity resting upon the assimilation of nations and the destruction of individuality. On the contrary, the Germanic consciousness, though it has sought the imperial bauble in Charlemagne and Otho, has been in general true to the principle of individuality in its broadest sense, the rights of the individual person and the individual State. Just as in the sixteenth century, Spain, a Latin country, sought to assimilate Europe to its own religious and political thought, so in the seventeenth century France also a Latin country made a like attempt under Louis XIV. ; an attempt which failed chiefly through the heroic efforts of the dwellers on a small strip of Germanic soil, Holland, a country which in the preceding century had in defense of the same principle defied the mightiest ruler of the age, Philip II. The services of this country in behalf of nationality can never be forgotten for they are greater than those of any other country of Europe.

Again after the lapse of a century, France renews the struggle, first in the republic and then in the Empire. Napoleon represents the most intense phase of the Latin consciousness, its culmination in modern times. The existence of an independent nation besides his own seemed to him not merely a contradiction, but a crime to be at once punished, and an insult to be at once avenged. That a people should dare to assert individuality, to make their own laws, to regulate their own affairs, to determine their own destiny appeared to him incomprehensible. I think that he was sincere, that such was his deepest principle of action. Assimilation was his watchword. One

of his famous sayings was, Europe must become French or Cossack. That is, one or the other, but one of them anyhow, all French or all Cossack. It may be fairly said that this sentence in one way exhibits the most portentous mistake on record. For it ignores not only the pronounced tendencies of his own time, but the general movement of the World's History, which has always sought to preserve the individuality of nations, to mediate it with a supreme authority. Napoleon hence collided with this principle and went down, though he possessed the greatest military genius that the world ever saw, though he had the mightiest armies and the vastest resources that were ever brought together. His career shows that his thought is doomed, for it can never expect to have again such a powerful supporter. But he was a true, indeed the truest representative of his nation. For France whether under republican or monarchical rule has always assailed nationality without, and individuality within. The consciousness is the same, and the only question seems to be, who shall carry it out, the rabble or the monarch.

England was the champion of this revolution, and justly and necessarily so. She had achieved above all other nations of Europe the rights of the individual person; her whole internal history is one struggle toward this end. Having thus secured the greatest freedom to the individual citizen, she very naturally extends her principle, and broadens her field of action and becomes the champion of the individual nation when it is assailed. It is true that England was not always consistent, for she too flagrantly violated na-

tions, but in her struggle with Napoleon, she gloriously vindicated the right of nationality. The Congress of Vienna caused a general restoration of all plunder, a return to the old limits of countries, in fine decreed national inviolability, which in spite of the exceptions has remained the fundamental principle of European diplomacy. Besides treaties, alliances, and leagues, there has grown up another but very inadequate form of recognition, the so-called International Law. Though this Law is administered by the individual nation, and hence depends upon what may be termed national caprice, thus resembling in many respects a person who administers the law in his own case, and at other times resembling that self-constituted justice known in the West as Lynch Law, it is nevertheless based on a true principle, and attempts to vindicate and define the rights of the individual nation.

Through the inadequacy of all these forms, treaties, alliances, leagues, and International Law, as well as arbitration, the individuality of the nation does not to-day feel itself secure in Europe. It is afraid that some powerful neighbor may assail it and hence the old distrust and danger remain that one individual State will swallow up the rest. Hence the standing army with all its dangerous and oppressive accompaniments is organized in order to protect their individuality. But the standing army is in every respect inadequate, for it may be beaten in the field on the one hand, and on the other it has a fearful tendency to destroy at home the very thing which it was intended to ultimately preserve, namely individuality. The rights of person are not, can not be esteemed very highly in

a military government. The deeper consciousness, therefore, is not yet ripened, the thought of the Constitutional Confederacy is not yet European. There is still the French and perhaps the entire Latin consciousness whose principle is the obliteration of nationality, assimilation, or, in their own language, solidarity of peoples. Nor is it by any means to be asserted that the Germanic consciousness is ready for the Constitutional Confederacy. Have we not just seen the empire again arise on German soil, from which it has been so often driven back, the very home of individuality? And it must be confessed that the problem of establishing the United States of Europe is far more difficult than was that of establishing the United States of America. Here there were different States, but the same nationalities; but in Europe there are different nationalities to be united, with all their antipathies, variety of interests, and historical grudges, and at the same time a privileged class whose pre-eminence rests upon the suppression of personal and national individuality.

But the true solution of the European problem is the Constitutional Confederacy. This, as was attempted to be shown before, signifies a confederation of States under a constitution whose entire substance and content is the security of the individuality of the States. Thus International Law becomes truly Law; thus the recognition of individuality is no longer subjective, merely somebody's notion, but it is real, an active institution in the world and embodied in an instrument, the Constitution. Thus too the standing army becomes impossible, for its only end and its only pretext, the security of nationality, is realized and

perfected by a wholly different means, the Constitutional Confederacy. Thus Peace enters the world through its only passage, through securing individuality to nations, for when the consciousness has arisen that every nation is secure not merely of its own individual existence, but also is determined to secure an individual existence, a free and untrammelled activity, to every other nation, how is war any longer possible, war which is the struggle of one State either to wholly absorb or to influence the destiny of other States? Thus too fear and distrust must cease, for mark the nature of this consciousness; how is it possible for Missouri to hate and distrust Illinois or Illinois Missouri if both are permeated with the thought of securing not merely for themselves but also for their neighbors a free unfettered state-existence, and moreover have realized that thought in a Constitution? To be sure such a Constitution without that consciousness is the most helpless of all sublunary things, but resting upon the same, it is the mightiest of all instrumentalities.

Thus the Constitutional Confederacy is the noblest edifice yet reared by man to secure his will, his freedom. The whole tendency of history has been to bring it forth; in its infantile form it has now appeared in the world: it may be reasonably added that the intelligence of man will yet perfect it in the course of history. The United States of America are still finite, not merely in their internal structure, but above all in the fact that they constitute a nation against other nations. Thus the Confederacy has its boundaries also against other nations and Confederacies, and

hence the old struggle between hostile individualities may be resumed, this time between individual confederacies. But it need not be said that thus they are untrue to their deepest principle, the absolute Recognition of the Individual. For it is equally a violation of that principle, whether the individual person, the individual State, or the individual Confederacy be assailed. The outcome however must be the same ; as we had a unity of nations brought forth by their mutual conflicts and wars, so we would now have a unity of confederacies. For upon this basis the most intense individualities must unite, the securing of individuality. Thus they all have a point of union, and their very intensity must only make that union stronger. The more determined they are to maintain their individual nationality, the more powerful securities do they demand ; hence the combination into Constitutional Confederacy. Thus we see that the nature of true individuality is to be universal ; the mightiest contradiction of human spirit is solved ; absolute difference is turned into absolute unity and harmony. Unity by itself, as destroying individuality or individuality by itself as destroying unity are the most terrific mistakes of mankind which they can only atone for by the sacrifice of individual existence both of persons and nations. The true insight is for peoples to make their very distinction the principle of unity.

How long it will take the world to realize this principle in its complete universality, is a question which it were wild to attempt to answer. The United States of America are already here ; the United States of Europe are in the thoughts of her intellects and in the aspira-

tions of her people, and seem to be coming; and shall we refuse the seal of universality to our principle, and relegate to dream-land the United States of the World? It is true that before such a result can be attained, there is a vast ocean to be crossed, an ocean of time and probably of blood; but the truth of logic, the demand of thought, the aspiration of the heart and the faith of mankind all point to such a consummation.

NO. 6. THE ENGLISH HISTORICAL DEVELOPMENT. — England was a province of the Roman Empire; she was also like her southern sisters, overrun and held by the barbarians of the North and passed through very similar stages of development. But in the thirteenth century the heterogeneous population of her soil begins to coalesce, there arises a common language, common institutions, England becomes a nation with a peculiar national principle. It is at this point that we may look for the origin of the English Constitution.

This word is vague and contradictory, yet at the same time of very great significance to the English consciousness. Look into the books upon the subject. Mr. Hallam in his great work has nowhere defined it, and I think that a careful analysis of numerous passages will show that he has confused and inconsistent notions about a constitution. Mr. Creasy says he will define it, but clearly does not. The reason is manifest, the English people have begun but not completed the realization of a constitution, they have not distinctly and logically organized its thought in a form of government, hence a complete definition can not be expected from them.

To take an example. It is said that an act of

Parliament is omnipotent according to the Constitution, then the Constitution itself is simply the will of Parliament or rather of the House of Commons. Is there anything which it would be unconstitutional for Parliament to do? Certainly not, if it be the highest. And yet the prerogatives of the King are said to be an essential part of the Constitution. The same is said of trial by jury; could it then be abolished by Parliament? There is evidently no safe-guard against such abolition, neither King nor judiciary could interfere. The Constitution evidently ought to be above parliament and prescribe its limitations; but it here affirms the omnipotence of parliament and thus specially denies its own restraining power. Still there is a settled feeling, not a distinct thought, that parliament must not contravene certain established principles, otherwise it acts unconstitutionally. These are stated by the writers upon English Constitutional law.

The political history of England is the history of the curtailment of the prerogatives of the crown. The first of these struggles against the king was conducted by the barons, the result of which was the famous *Magna Charta*; the second was made by Parliament and resulted in the Bill of Rights and Revolution of 1688. It is not our present purpose to elaborate the principles of these struggles in detail, though they are very necessary for a knowledge of our own government. It is sufficient to say that they have one general aim: to secure the will of the individual and the instrumentality of the same. That instrumentality is the complete supremacy of Parliament which was attained in 1688, since which time there has been no essential

change in the English Constitution. How inadequate and contradictory this ultimate principle is, has just been shown, nor did it take long to manifest its inherent nature.

England possesses distant colonies, and they can have no representation. But according to the English principle, Parliament is supreme, and the colonies must therefore become subject provinces paying taxes without being represented. It is at this point that the English principle breaks down. Parliament contradicts itself as the great representative body of the tax-paying citizens; the contradiction inherent in the constitutional maxim of supreme parliamentary authority has now developed itself. The result is a conflict between England and her colonies, each party supporting its own principle. Which party was right, is a question often asked. It can only mean, which party held to the more universal principle. England was compelled to declare practically — representation for me, subjection for my colonies. But the latter answered, no, we must have universal representation; when it is impossible, then we must have separation.

The Colonies did separate and began life with their new principle, which if it be carried out must also have new instrumentalities. The old Parliament of the mother-country will not do, it has proved its inadequacy. Under the new principle there can be no dependencies, no provinces, no colonies in the ordinary sense of being subject to another country, all must be equal. England could not solve the problem because she had not the thought of the Constitutional Confederacy which now appears as the next higher synthesis in the history of the world.

The separation not only severed the Colonies from the mother-country, but also from one another. The sole thread of unity being thus cut off, they are left as so many distinct and independent individualities. This is the condition in which the Declaration of Independence leaves the Colonies which may henceforth be called States. Now shall we expect the old struggle of the Greek and Italian Republics to be renewed? Our fathers were afraid of it, and often gave expression to their fears. Fortunately the higher consciousness was fast ripening, namely, the recognition of the individual State.

The first step is seen in the league as elaborated in the Articles of Confederation. But the league, as shown by history, is a very inadequate and transitory means for securing the nation. The result was that various States, after the external pressure of the war with England had been removed, began to fall asunder, and even to assail one another. Then came the thought of America's purest patriots and wisest statesmen, the formation of a Federal Constitution, which would secure to every State its own individuality throughout, which would not permit any State to destroy its own fundamental principle by destroying a neighboring State. Thus there is no need of a standing army, for its purpose is more adequately accomplished by other means. There can arise no war, for each State feels that in striking at a neighbor, it is only assailing itself. As long as this consciousness prevails, the jealousy, injustice, and turbulence of the republics of other ages, can not be here renewed. But if it once be lost, we can only expect a return of these evils with ten-fold magnitude.

Whence did our fathers get the thought of this Constitution? Its origin is not difficult to be traced. Each State has a constitution of its own, with a complete organization of the three functions of government. They all had, therefore, the one common characteristic, in fact, they all had, essentially, the same constitution. The logical step now was to realize this common element in a new constitution, which, however, is only a reflection of all the rest. Thus union is secured in the one above the others, and the individual existence of the State is also secured, for the higher one is essentially the others. Such a form of government has been before named the Constitutional Confederacy.

This short series of essays has attempted to state the logical basis of our institutions, and to give a cursory view of their historical development. They have been vindicated not after the legal fashion by precedent, but by thought. To be adequate, however, the outline here given should be filled up. Still, even as it is, the subject has hardly more than been commenced. Now we should take in hand the Constitution itself, and examine its provisions in the light of the foregoing principles, in order to see wherein it is inadequate, inconsistent and superfluous, as well as to behold and confirm for thought its excellences. That is we are now ready for a critique of the Constitution. Such a work could have only one ultimate content: that the security of the individuality of the States is the true unity of the government. The interpretations of the Constitution can therefore be derived from and tested by its fundamental principle. But this labor can not at present be undertaken.

WORKS BY DENTON J. SNIDER
PUBLISHED BY
SIGMA PUBLISHING COMPANY,
10 VAN BUREN STREET, CHICAGO, ILL.

I. Commentary on the Literary Bibles, in 9 vols.

1. Shakespeare's Dramas, 3 vols.

Tragedies (new edition),	\$1.50
Comedies (new edition),	1.50
Histories (new edition),	1.50

2. Goethe's Faust.

First Part (new edition),	1.50
Second Part (new edition),	1.50

3. Homer's Iliad (new edition),

" Odyssey,	1.50
--------------------	------

4. Dante's Inferno,

" Purgatory and Paradise,	1.50
-----------------------------------	------

II. Poems—in 5 vols.

1. Homer in Chios,	1.00
2. Delphic Days,	1.00
3. Agamemnon's Daughter,	1.00
4. Prorsus Retrorsus,	1.00
5. Johnny Appleseed's Rhymes,	1.25

III. Psychology.

1. Psychology and the Psychosis,	1.50
2. The Will and its World,	1.50
3. Social Institutions,	1.50

IV. Kindergarden.

1. Commentary on Froebel's Mother Play-Songs,	1.25
2. The Psychology of Froebel's Play-Gifts,	1.25
3. The Life of Frederick Froebel,	1.25

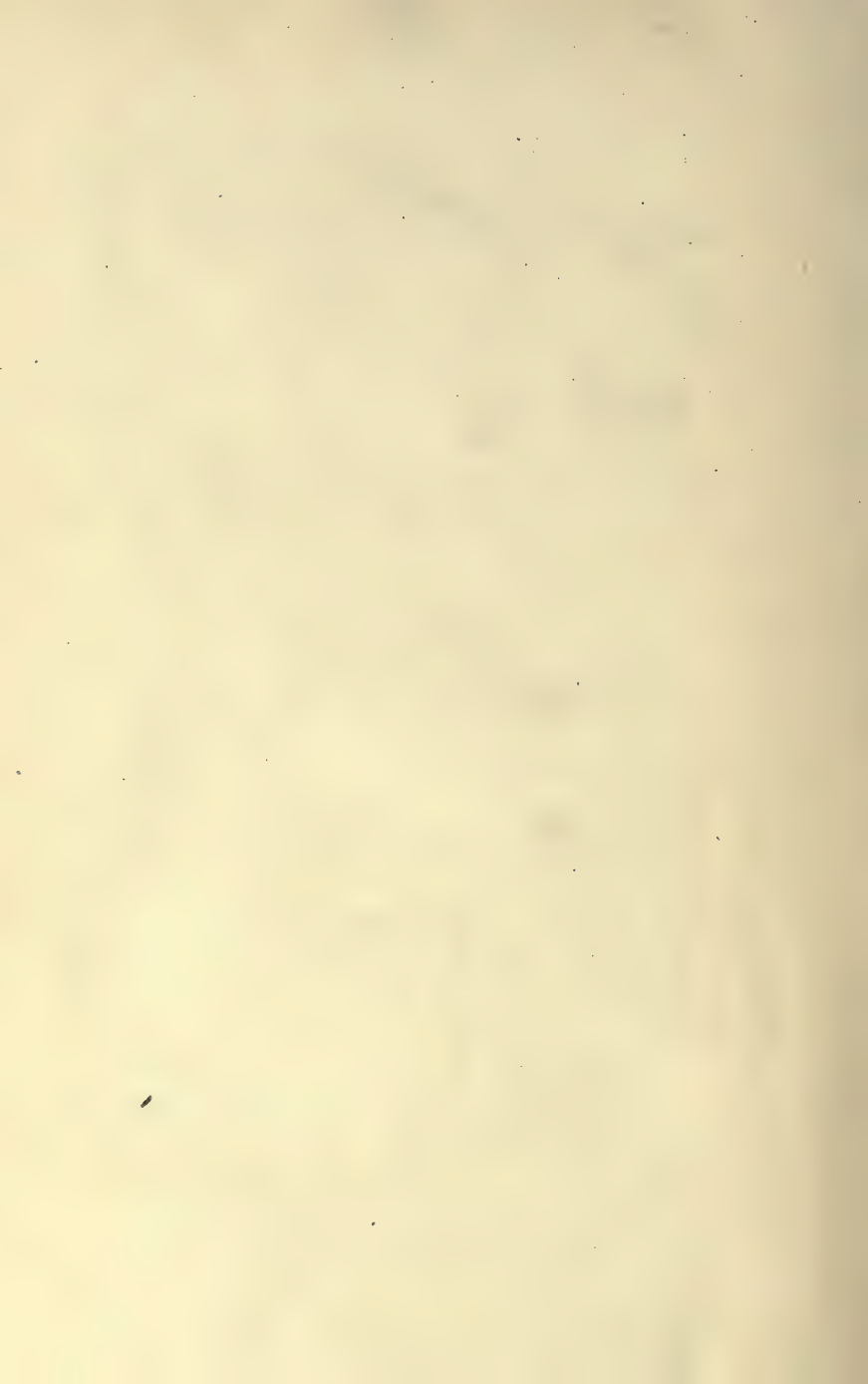
V. Miscellaneous.

1. A Walk in Hellas,	1.25
2. The Freeburgers (a novel),	1.25
3. World's Fair Studies,	1.25
4. The Father of History (Herodotus, <i>in preparation</i>),	

WORKS BY ELIZABETH HARRISON:

1. In Storyland,	1.25
2. Two Children of the Foothills,	1.25

For sale by A. C. M'Clurg & Co., Booksellers, Chicago, Ills.,
to whom the trade is referred.





Pol. Sci.

S67245

153369

Author Snider, Denton Jacques

Title The State/ specially the American State,

University of Toronto
Library

363 +
284-5-6
333 382

DO NOT
REMOVE
THE
CARD
FROM
THIS
POCKET

Acme Library Card Pocket

Under Pat. "Ref. Index File"

Made by LIBRARY BUREAU

